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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CODY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did petitioner's request for "each statement . . . made by any governmental authority to any [governmental] witness which could reasonably . . . be considered an inducement to cooperate with the government" constitute a "specific" request for evidence of a threat by FBI agents to murder or cause the murder of the government's key witness unless he subjected himself to the complete control of the government in its investigation of petitioner?

II. Did petitioner, a union official, violate the illegal benefit misdemeanor provision of the Taft-Hartley Act, 29 U.S.C. §186(b)(1), when employees, who were shop-stewards and, accordingly, had part-show jobs, voluntarily and openly served in their free time as drivers of the union car placed at petitioner's disposal, even though the evidence conclusively established that the employers did not intend that the employees provide petitioner with the services, and petitioner did not request that they perform the services?

III. Is the harmless-beyond-a-reasonable-doubt standard of review of *Harrington v. California*, 395 U.S. 250 (1969), applicable when a criminal defendent is denied his Sixth Amendment right of confrontation?

PARTIES

Petitioner is John Cody. Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

Petitioner, John Cody, respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit which was entered on November 28, 1983.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported. The relevant opinions of the district court are not reported.

JURISDICTION

The decision of the court of appeals was entered on November 28, 1983. The court of appeals denied a petition to correct factual errors in its opinion and for rehearing on December 23,

1983 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

2. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . .

3. 29 U.S.C. § 186 provides, in relevant part:

> § 186 *Restrictions on Financial Transactions*
>
> *Payment or lending, etc. of money by employer or agent to employees, representatives, or labor organizations.*
>
> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc. for money or other thing of value

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

STATEMENT OF THE CASE

On December 1, 1982, petitioner, the president of Local 282 of the International Brotherhood of Teamsters, was convicted by the United States District Court for the Eastern District of New York (Mishler, J.) of one count of violating the Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (Count I of the Indictment, "the RICO count"), four counts of violating the illegal benefit provision of the Taft-Hartley Act, 29 U.S.C. § 186(b)(1) (Counts II, IV, V and VI, "the Taft-Hartley counts"),* one count of filing a false and fraudulent income tax return under 26 U.S.C. § 7201 (Count VII) and one count of fraudulently and knowingly making and subscribing a false tax

* The Taft-Hartley counts were the only substantive RICO predicates on which petitioner was convicted.

return in violation of 26 U.S.C. § 7206(c) (Count VIII). (Counts VII and VIII, the "tax counts," were based on a single alleged transaction.) On February 28, 1983, the United States District Court for the Eastern District of New York (Mishler, J.) denied petitioner's motion for a hearing or a new trial based on a post-trial disclosure by the government that prior to trial, three FBI agents had threatened to murder or cause the murder of John Strong, the government's key witness at trial, unless he subjected himself to the complete control of the FBI. The district court refused to hold even an evidentiary hearing with regard to the incident, observing by way of justification that the RICO conviction would survive, even if Strong's testimony and the tax counts were written off (A-25-A-31). Petitioner timely appealed to the United States Court of Appeals for the Second Circuit, and, on November 28, 1983, that court reversed petitioner's conviction on Count II and affirmed in all other respects (A-2-A-23). On December 23, 1983, the court of appeals denied petitioner's application for a correction of factual errors in its opinion and for a rehearing (A-1).

At trial, the government's case on the tax counts was that John Strong, a real estate broker, paid a kickback of $100,000 to petitioner in 1975 in connection with a real estate transaction involving the union trust fund which petitioner failed to report as income on his 1975 tax return. The government's entire evidence as to this transaction was Strong's grand jury testimony that he had made such a payment. This alleged payment was also cited in the RICO count, but did not qualify as a substantive predicate. At trial, Strong recanted his grand jury testimony and testified that he had paid the $100,000 to a third party unrelated to petitioner. In order to offset Strong's recantation and to rehabilitate his grand jury testimony, the government introduced testimony from an FBI agent that Strong was afraid of petitioner. Based on this testimony, the government convinced the jury that Strong had testified truthfully before the grand jury, but had recanted that testimony at trial out of fear of petitioner.

The government, however, failed to disclose that prior to Strong's grand jury appearance, three FBI agents had threat-

ened to murder or cause the murder of Strong if he did not subject himself to the complete control of the government in its investigation of petitioner. Thus, the government went to the jury on the theory that Strong had testified truthfully in the grand jury but recanted that testimony at trial out of fear of petitioner, when it well knew—and did not disclose—that Strong might, in fact, have lied to the grand jury because of his fear of the government. Obviously, evidence of this extraordinary incident might have led the jury to acquit petitioner since it created a reasonable doubt as to the truthfulness of Strong's testimony before the grand jury.

Immediately after trial, and apparently in contemplation of a possible new trial, the government threatened to indict Strong for perjury. In response, Strong wrote to the government, challenging it to indict him and threatening to disclose the threat if it did so. According to Strong, three FBI agents had "threatened [his] life by personally guaranteeing [he] would be killed." Strong claimed that he had a tape recording of the incident. The government spent the next two months trying to get the tape from Strong. When those efforts failed, the government disclosed Strong's letter to petitioner, and admitted that the incident had, in fact, occurred.

Petitioner immediately moved in the district court for a new trial under Fed. R. Crim. P. 33. In affidavits submitted in opposition to petitioner's motion, the three FBI agents who were involved, including a high-ranking supervisor, admitted, in striking and similar detail, that on February 20, 1980, they met Strong, who was alone, in a room in the New York Hilton Hotel. They asserted that Strong was "cooperating" with the government in enforcement activities respecting a "Mr. X," a high-level member of the Carter administration, and petitioner. Just what role Strong played besides that of an informer was not disclosed, but apparently he was not obtaining the results which the agents wanted. In any event, the three agents admitted in their affidavits that the supervisor had threatened to murder or cause the murder of Strong. The only difference between Strong's recollection of the incident and the agents' concerned the precise nature of the threat. Whereas Strong claimed that the

agents had "personally guarantee[d] [he] would be killed," the agents claimed that the supervisory agent had threatened to throw Strong out of the window or to leak information respecting Strong's "cooperation" to petitioner, with the result that Strong would end up "in the trunk of a Mercedes at LaGuardia," unless he subjected himself completely to the control of the FBI. It is beside the point whether the agents had accurately and completely described the incident or were simply trying to mask the threat or nullify the incident by intertwining it with the suggestion that petitioner was a dangerous person. The undisputed fact is that the agents deliberately exploited naked fear in order to subject Strong to their complete control. The incident made a distinct impression on all three of them—as it certainly did on Strong.

The circumstances of the threat, even as related in the affidavits of the FBI agents, conclusively establish that the threat was a calculated effort to intimidate Strong. The FBI first contacted Strong in 1976. At that time, Strong stated that he had not paid any money to petitioner in connection with the real estate transaction. Later, Strong's real estate license was suspended, and it developed that he had not filed income tax returns for a number of years. The government arranged for the reinstatement of Strong's real estate license and the dismissal of the tax charges in return for his agreement to "cooperate." But, apparently, Strong did not "deliver" as the agents wanted, and it was at this point that he met with the agents in the hotel room. He subsequently testified before the grand jury that he had paid the kickback to petitioner.

Further, the agents' detailed recollection several years after the event shows that it was a truly significant event, and not simply a passing flash of anger. Quite notably, at trial, the government used another agent who had not participated in the threat to testify about Strong's alleged fear of petitioner, even though two of the agents who had participated in the murder threat were assigned to the prosecution task force and were present in court on a daily basis. Even though the FBI agent who testified at trial swore to tell "the whole truth," he failed to

disclose the threat to execute Strong in which his fellow agents, present in court, had participated.

Moreover, the seriousness of this matter is evident from the government's urgent opposition to petitioner's motion for an evidentiary hearing. Such a hearing might well have elicited the tape which Strong claimed he had. In any event, the full circumstances would have been disclosed at a hearing, particularly the impact on Strong. Interestingly, the government has never taken up Strong's challenge to indict him for perjury.

Before trial, petitioner had requested that the government disclose "each statement . . . made by any governmental authority to any [governmental] witness which could reasonably . . . be considered an inducement to cooperate with the government" (A-40, ¶ 8(c)). Based on this request, the district court concluded that petitioner had made a "specific" request for evidence, such as the FBI's threat to murder or cause the execution of Strong, and, therefore, that petitioner would be entitled to a new trial under *United States v. Agurs*, 427 U.S. 97 (1976), if evidence of the threat to murder Strong might have affected the jury's verdict (A-28). The district court avoided the issue and denied petitioner's motion, without even holding an evidentiary hearing, on the grounds that his RICO conviction would stand even if Strong's testimony and petitioner's conviction on the tax counts were written off (A-29-A-30).

On appeal, the court of appeals minimized the significance of this incident by asserting that "[o]ne of the agents . . . apparently lost his temper" and threatened to "throw Strong out the window" (A-29). The court of appeals did not mention the fact that the agents had "personally guarantee[d]" Strong that he would be executed. The court of appeals also ignored the fact that the district court had denied petitioner's request for an evidentiary hearing to elicit the full details of the incident.

More importantly, the court of appeals disposed of the issue by holding that petitioner had made only a "general" request for such evidence as the FBI's threat to murder Strong, and that petitioner was not entitled to a new trial under the more strin-

gent standard of materiality applicable under *Agurs* when the defendant has failed to make a "specific" request (A-29).*

In finding that petitioner had made only a "general" request, the court of appeals overlooked a crucial part of the record. In its factual statement regarding this issue, the court described petitioner's pre-trial discovery demand as follows:

> "Appellant's pre-trial discovery request inquired:
>
> 'Whether the government intends to call an informant or accomplice as a witness at trial. If so, please identify him or her and set forth the following:
>
> . . . . .
>
> (d) any and all records, memoranda and correspondence between the witness and law enforcement authorities which might reasonably reflect on the witnesses' motives and relationship with the government.'
>
> Clearly, this request sought only documentary material—i.e., "records, memoranda and correspondence"—and the government responded by providing the defense with documents relating to Strong's cooperation. *Appellant's only other relevant request* was phrased in vague, catchall terms:
>
> 'Set forth all information and evidence, which would tend to exculpate the guilt of the defendant or mitigate the degree of the evidence or reduce the punishment which information and evidence is within the knowledge of the government or which by due diligence could be discovered by or made known to the government.'
>
> Taken either separately or together, these requests were not, as *Cody* now claims, specific enough to

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* When only a "general" request for evidence has been made, the defendant is entitled to a new trial only if the undisclosed evidence would create "a reasonable doubt that did not otherwise exist." *United States v. Agurs*, 427 U.S. at 112.

> application of the more stringent *Brady* standard. *See Brady v. Maryland*, 373 U.S. 83 (1963)." (A-29, n.1; Emphasis added)

In making the above "findings," the Second Circuit overlooked petitioner's pre-trial request that the government disclose

> . . .each statement . . . made by any governmental authority to any [governmental] witness which could reasonably . . . be considered an inducement to cooperate with the government (A-40, ¶ 8(c)).

There can be no dispute that this formal request was duly made. It was set forth in petitioner's briefs before the court of appeals and never contested. The thrust of petitioner's petition for rehearing was directed at the omission of this request from the court's opinion. Without explanation, that court refused to correct its statement of fact, and denied the petition for rehearing.

On Counts IV, V, and VI, the three surviving Taft-Hartley misdemeanors which provide the sole substantive basis for the RICO count, the government's case was based on the services of three union shop-stewards who were employed by contractors in part-show positions pursuant to the industry-wide union contract. These shop-stewards openly served as the drivers of a union-owned car used by petitioner in connection with union business during hours for which the contractors paid their salaries. Accordingly, there was no subterfuge in connection with this arrangement. In the court of appeals, the government conceded that each employee served as petitioner's driver on the employee's own initiative, and that the decision "plainly was not a decision made at the initiative of the employers." Further, the government did not charge in the indictment that the employees violated Section 186(b)(1) by accepting full pay for a part-show or no-show job. On the contrary, the government charged that petitioner alone violated the statute when he accepted the services voluntarily conferred on him by the employees, even though the evidence conclusively showed that the employers did not intend to confer a benefit on him and he did not seek or request the benefit.

In upholding petitioner's conviction on Counts IV, V and VI, the court of appeals held that Section 186(b)(1) does not require proof that an "employer" has *intentionally* given the "thing of value" at issue to "the union official" (A-15; emphasis added). The court held that "[i]t was enough to show that the employers paid . . . the chauffeurs and that Cody accepted their services" (A-15). Simply stated, the court of appeals held that a union official violates Section 186(b)(1) if, through no initiative of his own, he passively "accepts" some benefit which in some sense emanated from an employer of union members, even if the employer did not intend or care that a union official would derive some consequential benefit.

On Count II, the fourth Taft-Hartley count, petitioner was charged with using a rent-free apartment, in violation of Section 186(b)(1), which was provided at no cost to Marilyn Taggart, a licensed real estate broker who was said to be petitioner's mistress at the time. Petitioner did not have any opportunity to cross-examine Taggart with regard to her receipt and use of the touted "love nest," since she fled the jurisdiction when the government attempted to subpoena her. Before Taggart left, she told friends, completely unrelated to petitioner, that FBI agents were harrassing her, and that she was afraid of the FBI.

Prior to trial, the government moved to have Taggart's grand jury testimony admitted at trial. Petitioner objected that it was hearsay and its use would deprive him of his Sixth Amendment right to confrontation. The trial court expressed serious doubts as to whether Count II, which specificially involved Taggart, even stated a crime (which, as the court of appeals would hold, it clearly did not), and urged the government to sever it from the remaining counts of the indictment. However, the government insisted that Taggart's testimony was "essential to all counts of the indictment," and, on the basis of this representation, the trial court granted the government's motion (A-32-A-36). Accordingly, over petitioner's renewed objection and protest, Taggart's grand jury testimony was read to the trial jury by a female government agent.

On appeal, the court of appeals dealt with the Sixth Amendment question by avoiding it. It held that since the apartment

had been supplied to Taggart by someone who was not, and never had been, an employer of union members, there was no legal basis under Section 186(b)(1) for Count II, and it vacated petitioner's conviction thereon (A-10-A-14). The court of appeals conceded that Taggart's grand jury testimony had also been introduced to show petitioner's use of the drivers in connection with Counts IV, V and VI, but held that petitioner's conviction on these other counts should be affirmed since the testimony related primarily to Count II (A-18). In connection with this issue, the court failed to consider whether the admission of Taggart's testimony was harmless beyond a reasonable doubt. *See*, *Harrington v. California*, 395 U.S. 250 (1969). The court discounted the prosecutor's pre-trial representation that Taggart's testimony was "essential to the entire indictment" (A-17). The court held that "counsel's view of the needs of his case before going to trial is hardly relevant in deciding whether a jury has been prejudiced by the proof it actually hears" (A-17). It went on to hold that grand jury testimony of a witness, mysteriously absent from the courthouse, detailing an extramarital relationship and use of a "love nest," would not "arouse a typical, sophisticated jury today" (A-17).

Finally, in considering the extraordinary nature of the FBI testimony that petitioner was exploiting fear to control Strong, the government's failure to disclose its own threat to murder Strong for that very purpose, the admission of Taggart's grand jury testimony and her mysterious absence, this Court should be aware of one additional fact. Petitioner was convicted by an anonymous jury. Under this highly unusual procedure, each juror was assigned a number by which he or she was thereafter referred to, and petitioner was foreclosed from asking the juror his name or address. A pervasive aura was thus created that petitioner was a man to be feared by everyone, including the jurors. Into this was fed the "love nest" grand jury testimony of Taggart, the missing mistress, admitted in support of an illegal charge, and the FBI testimony that Strong was in such fear of petitioner that he would perjure himself when confronted by petitioner in open court. All of these circumstances suggest that petitioner did not receive a fair trial.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT CANNOT ALLOW A CRIMINAL CONVICTION TO STAND WHEN THE DECISION OF THE COURT OF APPEALS AFFIRMING THAT CONVICTION IS BASED UPON A MISSTATEMENT OF THE ESSENTIAL FACTS

In finding that petitioner failed to make a specific request for evidence such as the government's threat to murder Strong, the court of appeals made no reference to petitoner's request for "each statement . . . made by any governmental authority to any [governmental] witness which could reasonably . . . be considered an inducement to cooperate with the government." Obviously, the FBI's threat to murder or cause the murder of Strong, unless he subjected himself to the complete control of the FBI, constituted "an inducement to cooperate with the government." Certainly, death is the ultimate inducement! If the opinion of the court of appeals had properly reflected this request, the court could not have found that petitioner had failed to make a specific request.

This Court must not allow a fundamental error such as this to go uncorrected. If petitioner's conviction is to be affirmed, and he is to serve a substantial sentence of imprisonment, it should only be after he has been convicted in accordance with basic concepts of due process, and his conviction has been affirmed by an appellate court which has properly stated the facts and applied the law.

In this case, the court of appeals made a fundamental error as to the record. In his petition for rehearing, petitioner requested that the court of appeals correct this error. In fact, the government conceded that such an error had been made. Nevertheless, the court declined to correct its statement of fact, without any explanation. As an exercise of its supervisory power over the Federal courts, *see, Roviaro v. United States*, 353 U.S. 53 (1957), *McNabb v. United States*, 318 U.S. 332, 340 (1943), this

Court should grant the writ and vacate the judgment of the Court of Appeals with instructions that it correct the record and reconsider whether the government's failure to disclose the threat to murder Strong mandates the reversal of petitioner's conviction. Alternatively, this Court should grant the writ and consider the question on appeal on the basis of the actual facts.

II.

THE DECISION OF THE COURT OF APPEALS THAT PETITIONER FAILED TO MAKE A SPECIFIC REQUEST FOR EVIDENCE OF THE FBI'S THREAT TO MURDER THE GOVERNMENT'S KEY WITNESS IS CONTRARY TO THE AUTHORITY IN OTHER FEDERAL CIRCUITS AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

When the court of appeals, without explanation, refused to correct its opinion to include petitioner's request for "each statement . . . made by any governmental authority to any [governmental] witness which could reasonably . . . be considered an inducement to cooperate with the government," it must have concluded that this request, like the others described in the court's opinion, was not specific under the *Agurs* rule. Such a holding conflicts with the decision of this Court in *Agurs*, with the decisions of the courts of appeals of a number of other circuits, and raises an extremely important question of federal law.

In *Agurs*, this Court defined the function of a request for evidence. It is to give the prosecutor notice of what the defense desires. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106. This Court distinguished a "specific" request for evidence from one which is "general" in nature. This Court defined a "general" request as one in which only a request for "*Brady* material" or "anything exculpatory" is made, and noted that such a request really gives the prosecutor no

better notice than if no request is made. 427 U.S. at 107. In determining whether a request is "specific," several courts of appeals have held that the test is whether, under all the circumstances presented by the case, the request is such as to give the prosecution reasonable notice of what the defense desires. *Scurr v. Niccum*, 620 F.2d 186, 190 (8th Cir. 1980); *United States v. Weidman*, 572 F.2d 1199, 1204 (7th Cir.), *cert denied*, 439 U.S. 821 (1978); *United States v. McCrane*, 547 F.2d 204 (3rd Cir. 1976).

In this case, petitioner requested prior to trial evidence of "each statement . . . made by any governmental authority to any [governmental] witness which could reasonably be considered an inducement to cooperate with the government." Clearly petitioner's request was sufficiently specific to put the prosecution on notice that the petitioner was seeking evidence such as a threat by FBI agents to murder the government's key witness at trial. What greater inducement to cooperate with the government could there be? This request is certainly not in the class with a "general" request for "*Brady* material," or "anything exculpatory." In fact, it is more specific than the requests found to be "specific" by the Third Circuit in *United States v. McCrane*, *supra*, the Fourth Circuit in *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980), and the Eighth Circuit in *Scurr v. Niccum*, *supra*.

Simply stated, the court of appeals has distorted *Agurs* by holding that any request which does not demand the precise evidence at issue is "general." Rather than serving *Agurs'* goal of assuring that discovery demands give the prosecution notice of the evidence sought by the defendant, the Second Circuit has imposed an unrealistic burden on the defendant to demand each and every piece of evidence which may exist in the prosecutor's file. The result of this holding will be the use of voluminous boiler-plate discovery demands which request every conceivable piece of evidence in the prosecutor's file.

Moreover, the decision of the Second Circuit is not an aberration. On the contrary, it is consistent with a number of decisions which have followed in the wake of *Agurs*. Unfortunately,

the courts of appeals have failed to follow a consistent line of reasoning in distinguishing "specific" from "general" discovery requests. *Compare Chavis v. North Carolina*, 637 F.2d at 224-25 (request for "psychiatric or other reports which might *Crane*, 547 F.2d at 207 (request for "material which may prospective witnesses" held specific) and *United States v. McCrane*, 547 F.2d at 207, (request for "material which may be used to impeach prosecution witnesses" held specific) with *Ostrer v. United States*, 577 F.2d 782, 786 (2d Cir.) *cert. denied*, 439 U.S. 1115 (1978) (request for "material in the possession of the Government bearing adversely on the credibility, character and reputation" of a specified government witness held to be a "boilerplate demand" and not sufficiently specific), *United States v. Lasky*, 548 F.2d 835, 839 (9th Cir.), *cert. denied*, 434 U.S. 821 (1977) (request for "all probation reports, presentence interviews and reports for 14 individuals" and request for "all information regarding police records, arrests, convictions and any deals, promises, or communications with Government witnesses regarding benefits . . . for testifying" held not specific), and *United States ex rel. Moore v. Brierton*, 560 F.2d 288 (7th Cir.), *cert. denied*, 434 U.S. 1088 (1977) (request for all "written statements in the possession of the prosecution . . . taken from any witness subsequent to the murder" held not specific).

As one commentator has noted, "[r]equests have been found *specific* when there was an aura of prosecutorial unfairness, and linguistically similar requests have been found not specific when the prosecutor was apparently blameless." Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 Stanford L. Rev. 1133, 1152 (1982). However, in *Agurs*, this Court specifically held that the prosecutor's motive is not a relevant factor in determining whether a discovery request is specific. 427 U.S. at 110.

In sum, the decision of the Second Circuit in this case presents an important question of Federal law. It conflicts with decisions of the Third *(United States v. McCrane, supra)*, Fourth *(Chavis v. North Carolina, supra)* and Eighth Circuits *Scurr v. Nicodem, supra)*. And, it presents this Court with an excellent opportunity to clarify the circumstances upon which a request for evidence will be deemed "specific." Accordingly, this Court

should grant the writ and decide this important question of Federal law.

III.

THE DECISION OF THE COURT OF APPEALS PRESENTS AN INTERPRETATION OF 29 U.S.C. § 186(b)(1) WHICH CONFLICTS WITH THE DECISION OF THIS COURT IN *ARROYO V. UNITED STATES*, 359 U.S. 419 (1959)

As pointed out by the circuit court in its opinion, petitioner's RICO conviction and the five-year term of imprisonment he received thereon, are predicated solely on his Taft-Hartley misdemeanor convictions on Counts IV, V and VI. Despite the energetic preamble to the circuit court's opinion, petitioner's RICO conviction must stand or fall with the circuit court's novel and unique interpretation of 29 U.S.C. §186(b)(1). The opinion below responds to its own call to arms by sustaining a RICO felony conviction and sentence based on these misdemeanors from which it has eliminated criminal intent.

Section 186(b)(1) provides that it shall be unlawful for a union official to accept any "thing of value" prohibited under Section 186(a). In turn, Section 186(a), in relevant part, prohibits payments by an "employer" to an official of a union which represents employees of the employer. In this case, Counts IV, V and VI were based on the services of three union members who were employed by contractors in part-show positions, and who served as drivers of the union-owned car used by petitioner in connection with union business during hours for which the contractors paid their salaries. In the court of appeals, the government conceded that the employees served as drivers of the union vehicle on their own initiative, and that the decision was not made at the initiative of the employer or petitioner. The evidence at trial conclusively established that the employers did not intend to confer a benefit on petitioner.

At trial, petitioner requested that the district court instruct the jury with regard to this issue as follows:

> It is not a crime for the drivers themselves to give a thing of value to Mr. Cody. That item of value must represent something that is coming from the employer *per se*. If you find, therefore, that the thing of value in those individual cases came not from the employer but from the employee, then you may not find the defendant guilty.

The district court denied this request and, over the objection of defense counsel, charged the jury:

> Now, whether [the drivers] volunteered these services to Mr. Cody during the working hours for which their employers paid is irrelevant. The fact that the employers tolerated the use of the services to chauffeur Mr. Cody is irrelevant. They may have preferred, some of them said, that these men may not be on the premises and be elsewhere. That is irrelevant.
>
> Again, the focus is on what Mr. Cody received. *Did he receive a benefit?* Did he receive something of value? And did he receive it knowingly, wilfully and unlawfully? (Emphasis added)

In upholding petitioner's conviction on Counts IV, V and VI, the court of appeals held that Section 186(b)(1) does not require proof "that the employers had *intentionally* given the services of their employees to" the union official (A-15; emphasis added). Instead, the Court held that "(i)t was enough to show that the employers paid . . . the chauffeurs and that Cody accepted their services" (A-15). In essence, the court of appeals held that Section 186(b)(1) is violated anytime a union official receives a benefit from a union member which has, in some sense, been made possible by the union member's employer, even if the employer does not intend to confer a benefit on him, and even if the underlying arrangement between the employer and union member is perfectly legal. This interpretation of the statute is in direct conflict with the decision of this Court in *Arroyo v. United States*, 359 U.S. 419 (1959).

In *Arroyo*, the defendant was the president of a union. In that capacity, he received money from an employer which he was to deposit in the union welfare fund. Instead, he pocketed the money. This Court held that Section 186(b)(1) applies only when an employer *intentionally* pays or delivers, or agrees to pay or deliver, a thing of value to a representative of his employees. Since the "good faith" of the employer in making the payment to defendant had not been questioned, and the evidence conclusively established that he had made the payment with the intention that it be deposited in the union trust fund, rather than with the intention that it go to the union official, this Court found that the defendant had not violated Section 186(b)(1), even though he had received money from an employer of union members. Thus, this Court clearly held in *Arroyo* that in order to establish a violation of Section 186(b)(1), the government must prove that an employer has given a thing of value with the *intention* that it go to a union official.

In its decision, the court of appeals cited *Arroyo* for the perfectly obvious proposition that Section 186(b)(1) does not require mutuality of guilt between the employer and the union official, a proposition which has no bearing at all on the arguments advanced by petitioner (A-15). Then, after citing *Arroyo*, the court of appeals went on to eliminate the element of intent from Section 186(b)(1), a holding totally at odds with the holding and rationale of *Arroyo*.

In light of the clear impairment of the authority of *Arroyo* by the court of appeals in this case, this Court should grant the writ and decide this important question of Federal law which has been raised.

IV.

THE DECISION OF THE COURT OF APPEALS WITH REGARD TO THE LEGAL CONSEQUENCES OF THE ADMISSION OF THE GRAND JURY TESTIMONY OF A MISSING WITNESS RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW

At trial, over petitioner's objection, the grand jury testimony of Marilyn Taggart was read to the jury. Taggart was not present at trial and petitioner did not have an opportunity to confront and cross-examine her. In *Harrington v. California*, 395 U.S. 250 (1969), this Court held that when a defendant is deprived of his Sixth Amendment right to confront the witnesses against him, his conviction must be reversed unless the reviewing court can find that the error was harmless beyond a reasonable doubt. Thus, the court of appeals could avoid the difficult constitutional question presented by the admission of Taggart's grand jury testimony only if it concluded that, even if erroneous, the admission of that testimony was harmless beyond a reasonable doubt. In its opinion, however, the court of appeals failed to make this determination. Instead, it upheld petitioner's conviction after finding that Taggart's testimony related primarily to a charge which could not lawfully be sustained, and then applying a non-constitutional harmless error analysis to the other charges (A-18).

The logic of this holding totally escapes us. Clearly, under *Harrington*, the harmless-beyond-a-reasonable-doubt standard of review would have applied if Count II had been valid. However, the Second Circuit held that if unconstitutional testimony is introduced primarily to support an *invalid* charge, the constitutional standard of harmless beyond a reasonable doubt does not apply. In effect, the government benefitted by violating petitioner's Sixth Amendment rights in connection with a charge which clearly did not state a crime. No decision of this or any other court supports this curious conclusion.

If the Second Circuit had applied the harmless-beyond-a-reasonable-doubt standard of review, it could not have avoided

the Sixth Amendment issue presented by the admission of Taggart's grand jury testimony. As the prosecutor represented at the hearing on the government's motion to admit Taggart's grand jury testimony, that testimony was "essential" to the government's case on "the entire indictment" (A-17). This was not a detached observation as the opinion below suggests. On the contrary, it was a firm representation which overcame the trial court's objection that Taggart's testimony related essentially to a count of dubious legality. The evidence of Taggart's relationship with petitioner was particularly prejudicial. This is especially so in light of the use of the anonymous jury procedure in this case, the FBI testimony respecting Strong, and the overwhelming and unfair suggestion planted in the minds of the jurors that petitioner was in some way responsible for Taggart's disappearance.

Because the decision of the Second Circuit conflicts with the decision of this Court in *Harrington*, this Court should grant the writ and reverse the decision below.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: New York, New York
February 17, 1984

Respectfully submitted,

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APPENDIX

ORDER OF THE SECOND CIRCUIT ON PETITION FOR REHEARING

United States Court of Appeals
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of December one thousand nine hundred and eighty-three.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN CODY,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, John Cody,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

The motion to stay the mandate pending the filing of a petition for writ of certiorari is DENIED.

A. Daniel Fusaro, Clerk

S/Francis X. Gindhart
by Francis X. Gindhart,
Chief Deputy Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1211, 1609—August Term, 1982

(Argued June 17, 1983 Decided November 28, 1983)

Docket Nos. 82-1428, 83-1100

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN CODY,

Defendant-Appellant.

Before:

OAKES and CARDAMONE, *Circuit Judges,*
and BARTELS, *District Judge**

Appeal from a judgment of conviction entered in the United States District Court for the Eastern District of

* Honorable John R. Bartels, Senior Judge of the United States District Court for the Eastern District of New York, sitting by designation.

New York, Jacob Mishler, *Judge*, following a jury trial, for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), receiving illegal benefits from employers, 29 U.S.C. § 186(b)(1), income tax evasion, 26 U.S.C. § 7201, and filing a false tax return, 26 U.S.C. § 7206(1).

Affirmed in part and reversed in part.

LAWRENCE H. SHARF, Brooklyn, New York, Special Attorney, for the United States Attorneys Office, Eastern District of New York, (Raymond J. Dearie, United States Attorney, Eastern District of New York, Edward A. McDonald, Attorney-in-Charge, U.S. Department of Justice, Organized Crime Strike Force, Eastern District of New York, and Michael A. Guadagno, Special Attorney, of Counsel), *for Appellee*.

PAUL WINDELS, JR., New York, New York, (Charles L. Stewart, Craig P. Murphy, Georgina M. Guernica, Kim Davenport, of Windels, Marx, Davies & Ives, New York, New York, of Counsel), *for Defendant-Appellant*.

CARDAMONE, *Circuit Judge*:

The leader of a local Teamsters union appeals his conviction on charges based upon unlawful schemes he

devised while serving as president of his local and trustee of its pension fund. The proof shows that he engaged in these schemes to enrich himself by means of extortion and kickbacks and through acceptance of valuable services from corporations that employed rank and file members of his local. A union representative is a fiduciary who may not feather his own nest at the same time he is supposed to be serving the union membership. As the facts of this case demonstrate, efforts directed toward such economic self-aggrandizement constitute not only a breach of trust, but serious criminal misconduct as well.

I—BACKGROUND

This appeal stems from the judgment of conviction entered against John Cody in the United States District Court for the Eastern District of New York, following a jury trial held before Judge Jacob Mishler. Cody was convicted of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) (Count I of the indictment), receiving illegal benefits from employers in violation of 29 U.S.C. § 186(b)(1) (Counts II, IV, V and VI), income tax evasion in violation of 26 U.S.C. § 7201 (Count VII) and filing a false tax return in violation of 26 U.S.C. § 7206(1) (Count VIII). He was found not guilty on Count III, another illegal benefit count. Appellant was sentenced to concurrent prison terms of five years on the RICO and tax evasion counts, three years on the false filing count and one year each on the illegal benefit counts. In addition, he was fined $25,000 on the RICO count, $10,000 on the tax evasion count and on each illegal benefits count, and $5,000 on the false filing count. Cody also appeals from a

post-judgment order denying his motion for a new trial. After reviewing appellant's numerous contentions, we reverse as to Count II—one of the illegal benefit counts—and otherwise affirm the judgment of the conviction and the order denying him a new trial.

II—FACTS

Local 282 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America represents truck drivers who deliver building materials to construction sites throughout the New York metropolitan area and Long Island. The Local 282 Pension Trust Fund ("Pension Fund") is one of four employee benefit plans to which employers that have collective bargaining agreements with Local 282 contribute. During the entire time frame of events alleged in the indictment, Cody held significant salaried positions with both Local 282 and the Pension Fund, including President of the Local, trustee of the Pension Fund and Fund Manager.

The first offense under Count I involved three incidents that occurred during the construction of Cody's home in Southampton, New York from 1968 through 1970. One of the builders, Cody's old friend Herbert T. Schneider, owned a construction company that employed members of Local 282. The value of Schneider's services amounted to $6,653; however, prior to the grand jury investigation in November, 1981, Cody had paid only $1,900 of this amount. After Schneider reported to Cody that the grand jury inquiry related to this outstanding bill, Cody promptly paid him in full. One of the Schneider's subcontractors, Gallagher Service Corp., also performed substantial work on the house. Cody eventually tendered a

check in part payment for these services but, at the same time, demanded that Gallagher kick back most of it. When Gallagher refused, Cody threatened him. Later, when Gallagher's employees voted to join Local 282, Gallagher went out of business. The final incident involving the Southampton home concerned an expensive driveway that cost the contractor, H.S. Roberts, Inc., $7,500 to install. Cody had asked one of the principals of Roberts for a "break" on the price and was told that although the company was too small to install the driveway without billing for it, it could probably do the job at cost. With this concession, Cody paid less than half of the contractor's costs, or $3,230.

In addition to these three incidents, the racketeering count encompassed two major kickback schemes arising from Cody's Pension Fund activities. The first occurred during 1969 and 1970 when the Fund's trustees arranged to purchase with Fund assets the Northampton Country Club. The Fund agreed to buy the golf club and adjoining acreage through Henry Norman, a part-time real estate agent and friend of the appellant. When Cody and another trustee learned that Norman's agency was to receive a $175,000 commission, they demanded a $60,000 kickback. At Cody's direction Norman paid $15,000 to Cody and $3,200 to the other trustee. The balance of the $60,000 kickback was invested in real estate. Four years later, under similar circumstances, Cody demanded and received another kickback from John Strong when the Fund purchased three parcels of undeveloped land referred to as "Pine Barrens." From Strong's commission of $700,000, Cody extorted $100,000.

All of these Count I charges, serving as predicate offenses for the RICO charge, occurred more than five years prior to the January 1982 indictment. To avoid

statute of limitations problems the government also listed as predicate crimes Counts II through VI, each of which transpired within the five-year period. The jury convicted Cody on four of these counts—II, IV, V and VI—as well as on Count I. Counts IV, V and VI charged him with receiving free chauffeuring service from "no show" employees who were members of Local 282. The first chauffeur was Charles Daglia. He worked concurrently for Cody and, as teamster foreman, for the Carlin and Atlas Construction Company. Although Carlin and Atlas paid Daglia over $600 per week, he had no duties at the jobsite, so he was able to chauffeur Cody without any distractions. Later, Cody was chauffeured for substantial periods of time by Louis Ambrosio and Bruce Kay, both members of the Local who, like Daglia, drew their salaries from construction contractors while spending their working hours serving Cody.

Count II of the indictment charged that Cody received the rent-free use of a luxury apartment in North Shore Towers, near the boundary between Nassau and Queens. In 1971 Sigmund Somer Construction Company (Somer or Somer Construction) began building North Shore Towers. It did not have a contract with Local 282, nor did it employ any of the Local's members, although several subcontractors working on the project did. At trial, the government's only allegation of a nexus between Somer Construction and Local 282 was that Somer had plans to erect an office building in Manhattan that would be subject to a "high-rise construction" agreement between employers and Local 282. Due to the death of Sigmund Somer, these plans never came to fruition. In any event, the government proceeded to prove that Cody's mistress, Marilyn Taggert, had the rent-free use of the apartment

from 1975 to 1977 and that Cody and Taggert each received free parking spaces in the Towers garage. The rental value of the apartment and garage spaces came to about $1,200 a month.

Perhaps the most damaging evidence with respect to the use of the rent-free apartment was Ms. Taggart's grand jury testimony which, over the strenuous objections of defense counsel, was read in her absence. The trial had originally been set to begin on June 7, 1982. Taggart successfully avoided service of a trial subpoena by fleeing to Europe. As a result, a continuance was granted until September in order to locate her, but these efforts were unavailing. It was in light of her untimely disappearance that Judge Mishler permitted the government to read her testimony into the record.

III—RICO COUNTS

To establish Cody's guilt under the RICO count of the indictment the government had to prove that he committed at least two predicate offenses, 18 U.S.C. § 1961(5), one of which occurred within the five-year statute of limitations, 18 U.S.C. § 3282. *See United States v. Walsh*, 700 F.2d 846, 851 (2d Cir. 1983). While the work on Cody's Southampton house and the kickbacks of real estate commissions from Strong and Norman charged seven predicate RICO offenses indicating a pattern of racketeering activities, these events occurred beyond the five-year period of limitations. Thus, even though the jury found Cody guilty on six of the seven charges, his RICO conviction may be sustained only if one of the four offenses charged separately in Counts II, IV, V and VI—all of which occurred within five years of the indictment—is upheld.

Before undertaking to analyze the substance of these charges, it is helpful to put them in perspective by briefly reviewing the statutory development. Among the concerns addressed by the Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 101, 61 Stat. 136, was the surfacing evidence of corruption, which § 302 of the Act, 29 U.S.C. § 186, was designed to meet. 1 C. Morris, *The Developing Labor Law* 37 (2d ed. 1983) (Morris). Later revelations before the McClellan Committee in 1957 uncovered even more evidence of serious abuses by a handful of certain union officials, precipitating amendments contained in the Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 Pub. L. No. 86-257, 73 Stat. 519. Morris at 49, 59; Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 852-55 (1960). As the language of the amendments and their legislative history makes clear, Congress declared as its purpose in the Landrum-Griffin Act that labor officials serve as fiduciaries, 29 U.S.C. § 501, and act in accordance with "the highest standards of responsibility and ethical conduct in administering the affairs of their organizations," 29 U.S.C. § 401(a). Noting that using one's union office for personal financial advantage—playing both sides of the street—is a conflict of interest that corrupts and weakens the national labor movement, the legislative history accompanying the Landrum-Griffin Amendments states:

> For centuries the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve. Such a person may not deal with himself, or acquire adverse

> interests, or make any personal profit as a result of his position. The same principle has long been applied to trustees, to agents, and to bank directors. It is equally applicable to union officers and employees.

S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2330. Under the provisions of § 302 of the Taft-Hartley Act, it had been illegal for an employer to pay or deliver anything of value to a representative of his employees. 61 Stat. at 157. Section 505 of the Landrum-Griffin Act amended section 302 of the Taft-Hartley Act and broadened the scope of the proscription of "any payment" by an employer (with certain narrow statutory exceptions not here pertinent) and also forbid the receipt of any such payment by any person representing employees. *See* 1959 U.S. Code Cong. & Ad. News 2329. The amendment was designed to close some of the loopholes in the Taft-Hartley Act by punishing all forms of bribery and extortion in labor-management relations. *See id.* at 2330. Specifically, it recognized that some union officials were just as inclined to extort money as some employers were to give bribes. Thus, the activities engaged in here are precisely of a nature Congress sought to forbid. With this background in mind we turn first to Count II.

IV—COUNT II

Cody's conviction on Count II was for accepting the rent-free use of an apartment from an employer in violation of the amended Taft-Hartley Act. As discussed, the Act makes it unlawful for an officer of a labor organization to receive or accept anything of value from someone

who employs members of that labor organization. 29 U.S.C. § 186(b)(1) (1976). Appellant argues that his Count II conviction should be reversed and the charge dismissed because there was no existing employment relationship between Somer Construction and members of Local 282, as required by subsection (a) of the statute.

During the trial the government conceded that Somer Construction did not employ members of Local 282 during the time Cody and Taggart enjoyed use of the North Shore Towers apartment. Nevertheless, it advanced two grounds for finding the payment unlawful. First, it argued that Somer Construction was a general contractor that had contractual relationships with its subcontractors, the employees of which were members of the local. Second, Somer Construction had plans to build an office building in Manhattan, which the government claims would have been covered by the "high-rise" agreement between Local 282 and employers that provided for exclusive use of union labor. Thus, the government concludes that there was a sufficient nexus between Somer Construction and Local 282 members, regardless of whether an employer-employee relationship existed.

The government's position finds little or no support in the language of the statute. Its argument linking Somer Construction to its subcontractors' employees is easily rejected. Congress provided that it was "unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." 29 U.S.C. § 186(b)(1). Subsection (a) of § 186, in pertinent part, prohibits

> any employer or association of employers [from paying, lending or delivering] any money or other

> thing of value . . . (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the *employees of such employer* who are employed in an industry affecting commerce . . . .

29 U.S.C. § 186(a) (emphasis supplied).

Whether the various subcontractors employed members of Local 282 is of no significance under the statute. The language specifically refers to the "employees of such employer," and the employer, Somer Construction, had no Local 282 members as its employees. Moreover, a literal reading of § 186 is entirely appropriate because it is consistent with the statute's purpose—to deter and punish the bribery of employee representatives by employers and the extortion of employers by employee representatives. *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959); 93 Cong. Rec. 4746 (1947); 92 Cong. Rec. 4893 (1946). The proof shows that Somer Construction had no direct relationship with Local 282 employees. Its relationship with its subcontractors' employees was too indirect to support the claim that Cody had sufficient leverage to extort from Somer or that Somer had any incentive to bribe Cody. Further, the threat of such statutory violations arising indirectly was even less likely in view of the fact that the subcontractors had completed their work on North Shore Towers prior to the time Cody and Taggart obtained the free use of the apartment.

The government's second argument on Count II—that Somer would have employed Local 282 members in the future—is equally unpersuasive. As noted, § 186(a)(2) refers to "the employees of such employer who are employed in an industry affecting commerce . . . ." This language requires an *existing* employment relation-

ship, between the employer and members of the union, not the possibility of a future relationship. *See Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 169 (1971). To counter this point the government seizes on the surrounding language, which prohibits payments by an employer to the representative of a union that seeks to represent or "*would admit to membership*, any of the employees of such employers . . . ." 29 U.S.C. § 186(a)(2) (emphasis supplied). Relying on this conditional verbiage, the government argues that Somer and Cody violated the statute since Somer subsequently would have employed members of Local 282 if and when it built the Manhattan office building. Such a construction of § 186 is inconsistent with its purpose and with the facts of this case.

The legislative history reveals that subsection 186(a)(2) was added in 1959 for a specific reason—to deal with employers' attempts through bribery of union officials to block unionization of their *present* employees. *See* S. Rep. No. 187, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2329-30 (purporting to override the decision in *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957)). In other words, the statute was designed to protect the possible future unionization of present employees, not, as here, the possible future hiring of present union members.

We recognize that there may be circumstances in which the possible future hiring of unionized workers might lead to abuses that § 186 was designed to prevent. But such is not the present case. Here, neither Somer Construction nor Sigmund Somer had ever employed a member of Local 282, nor was either a signatory to the high-rise agreement. In addition, there was no evidence that Somer or his company had actual plans to build the new building

at the time he gave the apartment to Cody. Doubtless, the gift did not spring entirely from the kindness of Somer's heart, and perhaps it could be surmised that he hoped to obtain future goodwill from Cody, but the connection between Sigmund Somer Construction Company as an employer and Cody as an officer of Local 282 was too nebulous at the time the gift was made to be the basis for a criminal charge under § 186(b)(1).

Finally, the government's reliance on *United States v. Sink*, 355 F. Supp. 1067 (E.D. Pa.), *aff'd mem.*, 485 F.2d 683 (3d Cir. 1973), is misplaced. In *Sink*, there was no doubt that the employer was actively planning expansion into Philadelphia, where its present employees would have been admitted to the local union, and that the gift from the employer to the Philadelphia union representative was made at the time this expansion was being contemplated. Thus, the potential for a collective bargaining relationship between the employer and the union leader already existed, and it could be inferred that a motive for the gift was to discourage efforts to organize the employer's workers. As already noted, it is this type of corruption that the framers of § 186 sought to deter, quite unlike the instant case where the plans were unformed and the friendly relationship was one not then fairly susceptible to a more disparaging interpretation. Accordingly, the conviction under Count II must be reversed.

V—COUNTS IV, V AND VI

Counts IV, V and VI of Cody's indictment were for receiving free chauffeuring service from construction company employees, in violation of 29 U.S.C.

§ 186(b)(2). Cody asserts that his conviction under these counts should be reversed because the government failed to prove that the employers had intentionally given the services of their employees to him and, further, because the trial court erroneously instructed the jury on this charge. Additionally, he claims that the employees themselves—not their employers—made a gift of their services. We find these arguments unpersuasive for the following reasons.

As noted, § 186(b)(1) proscribes the *receipt* by a union official of payments prohibited in § 186(a). Section 186(a), in turn, makes it unlawful for an employer to pay, lend or deliver anything of value to a union official representing his employees. In discussing the Taft-Hartley Act of 1947 the Supreme Court observed that nothing in the similar language of that Act (§ 302(a), (b)) "requires mutuality of guilt for the conviction of either the employer or the representative of employees." *Arroyo v. United States*, 359 U.S. at 423. An employer might be guilty or a representative of employees might be guilty or both might be guilty. *Id.* at 423-24. Plainly, the employer's purpose for making a payment is irrelevant since all payments, aside from those statutorily excluded, are unlawful. *See United States v. Ricciardi*, 357 F.2d 91, 99 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966). Consequently, it was unnecessary for the government to prove the employers' guilt as a predicate to Cody's. It was enough to show that the employers paid, lent or delivered the chauffeurs and that Cody accepted their services.

The trial court charged that the government was not required to prove that Cody requested or demanded the chauffeuring service, but merely that he received and knew that he was receiving a benefit of value. This charge

fairly and properly tracked the language of § 186(b) which makes it unlawful for a representative of a labor organization to receive anything of value from an employer.

Appellant attempts to distinguish his case from the typical § 168(b) charge by arguing that the chauffering services were given to Cody by the chauffeurs themselves, not by their employers. To hold that these services came from other than the employers, however, would allow § 186 to be circumvented almost at will. *See United States v. Pecora*, 484 F.2d 1289 (3d Cir. 1973). Here the salaries of Daglia, Ambrosio and Kay were paid by their respective employers. Instead of performing the jobs for which they were ostensibly hired, the three of them at different times spent their working hours, including overtime, providing free chauffeuring service to Cody. Although they may have served him willingly—after all, he was the head of the union of which they were members—the fact is that they did so while on the payroll of their respective employers. It is no different than if the employers had simply paid the salary of some person Cody had hired to be his chauffeur. That the three drivers carried the title "shop steward" or "working teamster foreman" does not in any way bear upon Cody's knowing receipt of something of value from an employer. *Cf. Haley v. Palatnik*, 509 F.2d 1038, 1042 (2d Cir. 1975) (illegal payments to union representative made indirectly through use of trust funds); *United States v. Overton*, 470 F.2d 761, 765 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973) (payments made indirectly through non-employer corporate instrumentality). In short, the government proved the charges contained in Counts IV, V and VI.

VI—PREJUDICIAL SPILLOVER

Appellant next contends that his conviction on all counts must be reversed because the admission into evidence of Marilyn Taggart's grand jury testimony violated his rights under the Sixth Amendment's Confrontation Clause. Cody's argument on this issue follows a three-step analysis: first, the trial court erred in admitting this testimony at trial; second, since Taggart's testimony was crucial to Cody's conviction on Count II, that result must be reversed; and, third, Taggart's testimony as well as Cody's Count II conviction tainted the entire trial, requiring reversal of his conviction on all counts. We need not discuss whether the trial court erroneously admitted Taggart's grand jury testimony at trial because we have already determined that Cody's conviction under Count II—the count to which Taggart's testimony related—must be reversed. But we must consider whether its admission prejudiciously spilled over, tainting the evidence on the other counts.

Upon reviewing Taggart's testimony, we find that it could not have led a jury to convict on any count other than Count II. Appellant points to the evidence of Cody's "illicit" relationship with Taggart as a form of marital "cheating," yet we scarcely think that kind of proof will arouse a typical, sophisticated jury today. Appellant also contends that the prosecutor, while seeking a continuance following Taggart's disappearance, admitted that Taggart's testimony was essential to the entire indictment. That, too, strikes us as frivolous since counsel's view of the needs of his case before going to trial is hardly relevant in deciding whether a jury has been prejudiced by the proof it actually hears.

In addition, there is no reason to believe that Taggart's testimony or Cody's conviction on Count II prejudiced the jury with respect to the remaining counts. We fully recognize that when evidence is erroneously admitted, a reviewing court must be alert to the danger of prejudicial spillover. Specifically, a jury should not allow such evidence to "infect its consideration of facially unrelated aspects of the case . . . ." *Klein v. Harris*, 667 F.2d 274, 290 (2d Cir. 1981). There was no substantial possibility of a prejudicial spillover effect in this case as Taggart's testimony fell almost entirely within the confines of the charges contained in Count II. Although she did make reference to the three chauffeurs, other evidence against Cody on those counts was so strong as to render such taint, if any, harmless. Hence, assuming that Taggart's grand jury testimony was inadmissible, it provides no sufficient basis to reverse appellant's convictions on the other counts. *See United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983).

VII—COUNTS VII AND VIII

Finally, the indictment included Counts VII and VIII which charged Cody with tax evasion and filing a false return. Both of these counts arose from Cody's failure to report and pay taxes on the $100,000 kickback he received from John Strong following the "Pine Barrens" deal. Cody contests his conviction for these crimes on several grounds: the trial court erroneously failed to sever the first six counts of the indictment from the tax counts; the evidence was insufficient; the trial court improperly ordered defense counsel to produce a tape recording of an interview between a defense investigator and John

Strong; and the government failed to disclose exculpatory evidence in the form of threats made by an FBI agent to Strong. We reject each of these contentions.

An appellate court will reverse a district court's denial of a Rule 14 motion to sever only upon the showing of a clear abuse of discretion. 1 C. Wright, *Federal Practice & Procedure*, § 227, at 854 (2d ed. 1982). *See* Fed. R. Crim. P. 14. In order to establish such an abuse the appellant must prove that he suffered prejudice so substantial as to deny him a fair trial. *United States v. Weisman*, 624 F.2d 1118, 1129-30 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); 1 C. Wright, *supra*, § 227, at 854-55. Denying appellant's severance motion was not an abuse of discretion. Joinder was entirely proper since Count I(c) of the indictment and the two tax counts were based on the same transaction—the kickback Cody received from Strong. Further, Cody failed to demonstrate prejudice. We acknowledge that some prejudicial effect will inevitably appear whenever two charges are joined, if only due to the fact that they arise out of the "same act or transaction." Apart from this, however, appellant has offered only conclusory allegations. The government presented sufficient, independent evidence on each count of the indictment, and the fact that the jury voted to acquit Cody on two of the RICO predicates indicates that it considered each count separately.

Appellant's "insufficiency of evidence" argument is similarly without merit. At trial, Cody conceded his guilt on Counts VII and VIII, if the jury subsequently were to find—as it did—that he received a kickback from Strong. Thus, appellant essentially is asking us to consider again the very issues that were properly before the jury and ultimately resolved against him. Viewing the evidence in

the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), we find the proof—including Strong's prior statement that he had paid the $100,000 to Cody as a kickback—more than ample.

The third ground raised pertains to the disclosure by defense counsel of a taped interview with John Strong. When the government first made a motion to discover the tape, defendant objected and the court refused to grant discovery. After Strong testified, the court directed the defendant to make the tape available for inspection and, without objection, defense counsel complied. On this kind of issue, an objection not raised at trial is waived. *See United States v. Rose*, 525 F.2d 1026, 1027 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976). The reason for the rule is to enable the trial court to correct any error it may have made so that unnecessary future proceedings may be avoided. *United States v. Indiviglio*, 352 F.2d 276, 280-81 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966). Here defense counsel made a strategic decision to use the tape in his cross-examination of Strong, rather than forego its use and object to the court's ruling requiring him to produce. Accordingly, it is now too late to challenge the production order.

Finally, we address Cody's contention that the government's failure to disclose threats made against witness Strong warrants reversal. John Strong first began to cooperate with the government on July 3, 1979 when he provided information of possible criminal activity involving Cody. Thereafter, Strong acted as an undercover operative at the direction of FBI agents. On February 18, 1980 Strong failed to record a telephone conversation he had with another criminal suspect, unrelated to the Cody investigation. As a consequence, FBI agents met with him

at the New York Hilton three days later to stress the importance of his full cooperation. At the meeting Strong expressed his reluctance to record further conversations with Cody. One of the agents began to argue with Strong and apparently lost his temper saying that if Strong did not follow instructions he would throw Strong out the window or inform Cody that Strong was an informant.

Although prior to trial appellant had requested disclosure of exculpatory evidence, he was not apprised of these threats made to Strong until shortly after the trial concluded. Cody then moved for dismissal of the indictment or, alternatively, for a new trial under Federal Rule of Criminal Procedure 33. Applying the standard set by the Supreme Court in *United States v. Agurs*, 427 U.S. 97 (1976), the district court denied appellant's motion. *Agurs* applies whenever a defendant makes a general request for exculpatory evidence,[1] and it provides that suppression of such evidence is significant

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[1] Appellant's pre-trial discovery request inquired:

> Whether the government intends to call an informant or accomplice as a witness at trial. If so, please identify him or her and set forth the following:
>
> . . . .
>
> (d) any and all records, memoranda and correspondence between the witness and law enforcement authorities which might reasonably reflect on the witnesses' motives and relationship with the government.

Clearly, this request sought only documentary material—i.e. "records, memoranda and correspondence"—and the government responded by providing the defense with documents relating to Strong's cooperation. Appellant's only other relevant request was phrased in vague, catch-all terms:

> Set forth all information and evidence, which would tend to exculpate the guilt of the defendant or mitigate the degree of the evidence or reduce the punishment which information and evidence is within the knowledge of the government or which by due diligence could be discovered by or made known to the government.

(footnote continued)

> if the omitted evidence creates a reasonable doubt that did not otherwise exist . . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.

427 U.S. at 112-13 (footnote omitted).

In the present case, it cannot be argued that the threats against Strong created "a reasonable doubt [as to Cody's guilt] that did not otherwise exist." The fact that Strong originally admitted, before the grand jury, to making the kickback and later recanted his testimony at Cody's trial raises doubt as to Strong's veracity. Yet the petit jury was well aware that Strong changed his story at trial, and it is unlikely that the jury's knowledge of the threats made against Strong would have weakened the government's case against Cody. Moreover, it is clear from Strong's trial testimony that he did not fear reprisal from the FBI agents. In fact, Strong's last-minute about face more readily suggests a substantial fear of Cody.

We do not condone the conduct of the FBI agents, and it would have been better for the government to disclose the threats since they did bear upon Strong's credibility. *Cf. Giglio v. United States*, 405 U.S. 150 (1972) (conviction reversed where nondisclosure affected a witness upon whom government's case almost entirely depended). Nonetheless, a prosecutor's failure to disclose evidence of only possible use does not automatically require a new trial. *Id.* at 154; *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968). As above articulated, the undisclosed

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Taken either separately or together, these requests were not, as Cody now claims, specific enough to warrant our application of the more stringent *Brady* standard. *See Brady v. Maryland*, 373 U.S. 83 (1963).

evidence must have been material, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the test for materiality in cases such as this is the *Agurs* standard. We conclude that whether or not the threat was before the jury, no reasonable doubt exists as to Cody's guilt. Thus, the government was not obligated to inform Cody of the threats made against Strong. As a consequence, the conviction on Counts VII and VIII must stand.

The judgment of the district court is reversed as to Count II of the indictment and affirmed on all other counts. The mandate of the court shall issue forthwith.

ORDER OF THE DISTRICT COURT DENYING MOTION FOR NEW TRIAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

— against —

JOHN CODY,

Defendant.

----------X

CR 82-0013

ORDER

February 28, 1983

MISHLER, District Judge

Defendant's motion for a new trial pursuant to Rule 33, Fed.R.Cr.P. is in all respects denied, and it is

SO ORDERED.

The court expects to file a memorandum of decision on or before March 10, 1983.

U. S. D. J.

MEMORANDUM OF DECISION AND ORDER OF THE DISTRICT COURT DENYING MOTION FOR NEW TRIAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

— against —

JOHN CODY,

Defendant.

----------X

CR 82-0013

Memorandum of Decision and Order

March 2, 1983

MISHLER, District Judge

BACKGROUND

Defendant John Cody, President of Local 282 of the International Brotherhood of Teamsters and a trustee of its pension fund, was convicted after trial of participating in the conduct of the affairs of the Local through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).[1] The indictment charged seven (7) predicate crimes for which prosecution was barred by the statute of limitations and five (5) predicate crimes which were also charged as substantive crimes. One of the predicate crimes that was time-barred alleged that between March 22, 1974 and January 1975, Cody demanded and received a kickback of $100,000 from John Strong in violation of 18 U.S.C. § 1954. Count Three of the indictment charged that between September 1978 and January 1982, Cody solicited and agreed to receive the sum of $250,000 from John Strong in violation of 18 U.S.C. § 1954.

The jury found that Cody had unlawfully received the $100,000 kickback (for which prosecution was barred by the statute of limitations), but that Cody was not guilty with respect to the charge in Count Three. The jury found that the government had proved five (5) additional predicate crimes. Cody moves pursuant to Rule 33, Fed.R.Cr.P., for an order directing a new trial on account of statements made by F.B.I. Agent Kenneth Walton to Strong at a meeting on February 21, 1980.[2]

FACTS

On July 3, 1979, John Strong appeared at the office of the Brooklyn Strike Force. He told F.B.I. Agents Monte Smith and Joseph Smith and Special Attorney Michael A. Guadagno that he had negotiated a purchase of land by the Local 282 Pension Fund in 1974 with respect to which he paid Cody a $100,000 kickback. He further stated that he had attempted to resell the land and that Cody would receive $250,000 in the event of such a sale. These acts were among the predicate crimes charged against Cody under § 1962(c). Strong agreed to act in an undercover capacity to obtain evidence against Cody. Strong also

provided information concerning subjects unrelated to the Cody matter. Strong was equipped with recording devices and was instructed to record all conversations with Cody and others against whom he had made allegations of wrong doing. Strong met with Cody and others on several occasions, but in each instance he failed to record the conversations.

On February 21, 1980, F.B.I. Agents Kenneth P. Walton, Kenneth Lynch and Mary Jane Bocra met with Strong at the New York Hilton Hotel. Statements made by Agent Walton to Strong at that meeting form the basis of the instant motion for a new trial

Cody has submitted to the court a copy of a letter from Strong to his lawyer, dated December 5, 1982, in which Strong expresses concern over a possible perjury indictment stemming from testimony he gave in the Cody trial. In the letter, Strong states that

> Kenneth Walton threatened my life by personally guaranteeing I would be killed...Should I be indicted, and I expose Walton's threat on my life; that probably will give a defense to Cody on his appeal. My Grand Jury testimony could be considered tainted because that testimony came after the death threat of Walton. I am not interested in helping Cody on his appeal. Is the Government?

On February 4, 1983, Messrs. Guadagno and Bernstein wrote Cody's appellate counsel advising them that the government had received the December 5, 1982 letter to Strong's lawyer and had interviewed F.B.I. Agents Walton, Lynch and Bocra. In the February 4, 1983 letter, Guadagno and Bernstein stated that the Agents gave the following account of the February 21, 1980 incident at the New York Hilton Hotel:

> At the outset of the meeting, when Mr. Walton began to discuss Mr. Strong's activities as an informant, Mr. Strong started screaming at Mr. Walton. Mr. Walton told Mr. Strong that he was going to throw him out the window and, later, that he would tell John Cody that Mr. Strong was a "snitch" and that Mr. Strong would be found in the trunk of a car at LaGuardia Airport.

The moving affidavit characterizes Walton's conduct and statements made on February 21, 1980, as an explicit threat "to murder Mr. Strong, or to set him up for a gangland type execution." Cody argues that the failure to reveal this threat to the Grand Jury so that it could evaluate Strong's motive for testifying against Cody, requires dismissal of the indictment. Alternatively, Cody argues that the failure to advise him of the threat, in response to his demands for any communications between the government and witnesses "which might reasonably reflect on the witness' motives and relationship with the government" [Item 4(d) in letter request dated January 20, 1982] and for all exculpatory material [Item 10 in letter request dated January 20, 1982], was a suppression of evidence violating due process. Cody cites as support *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194 (1963); *United States v. Provenzano*, 615 F.2d 37, 47 (2d Cir. 1980); *Ostrer v. United States*, 577 F.2d 782, 786 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1018 (1979).

Cody claims that he could have used the supressed information to show the jury that the testimony Strong gave at the trial was truthful and the testimony given before the Grand Jury was false; that the reason for testifying falsely before the Grand Jury was the fear of bodily harm resulting from Walton's threat (more than a year before); and to counter the government's claim that Strong testified falsely at trial out of fear of Cody.

DISCUSSION

Information in the hands of the F.B.I. is attributable to the prosecutor. Thus, the prosecution was in constructive possession of the statements made by Agent Walton at the time of trial.[3] *Wedra v. Thomas*, 671 F.2d 713, 717-18 n.1 (2d Cir.), *cert. denied*, U.S. , 102 S. Ct. 3491. We assume, without deciding, that under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), the government was required to turn over Agent Walton's statement in response to Cody's request. *See United States v. LeRoy*, 687 F.2d 610 (2d Cir. 1982). Nevertheless, we conclude that a new trial is not warranted.

In *United States v. Agurs*, the Court defined the duty of the prosecutor in responding to a discovery demand:

> Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.

427 U.S. 97, 106, 96 S. Ct. 2392, 2399 (1976).[4] However, the prosecutor is not responsible in failing to respond to general requests for "all Brady material" or for "anything exculpatory" unless the material is of an "obviously exculpatory character." *Id.* at 106-07, 96 S. Ct. at 2399. The prosecutor does not violate "his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 108, 96 S. Ct. at 2400. Suppressed evidence is of significance "if the omitted evidence creates a reasonable doubt that did not otherwise exist. . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Id.* at 112-13, 96 S. Ct. at 2402.

Walton's threat was relevant to Cody's trial only insofar as it reflected on the credibility of Strong. The only crime for which Cody was convicted, and in which the testimony of Strong played a part, was the payment of $100,000 by Strong to Cody. Even if Cody had been found not guilty of that crime, there would still be five (5) predicate crimes supporting the RICO conviction. Under RICO, only two predicate crimes are required to obtain a conviction. 18 U.S.C. § 1961 (1) & (5). Thus, not only is no reasonable doubt created by the additional evidence (Walton's threat), it is incontrovertibly clear that a conviction would have resulted even if the jury had accepted Cody's contention that Strong's trial testimony, rather than his Grand

Jury testimony, was truthful. Moreover, any claim of prejudice because of the withholding of the alleged suppressed information is indeed weak in light of the jury's finding of "Not Guilty" as to Count Three of the Indictment, the only other count with respect to which Strong's testimony was relevant. Accordingly, we find that had Mr. Walton's statement been available to Cody at trial, it would not have produced a different result.[5] *See Pelegrina v. United States*, 601 F.2d 18, 21 (1st Cir. 1979) (enhanced veracity of witness whose testimony exculpated defendant is immaterial for purposes of a Rule 33 motion); *United States v. Perno*, 605 F.2d 432 (9th Cir. 1979); *United States v. Bostic*, 360 F. Supp. 1305 (E.D. Pa. 1973), *aff'd*, 535 F.2d 1248 (3rd Cir.), *cert. denied*, 429 U.S. 840, 97 S. Ct. 112-13 (1976).[6]

The motion is in all respects denied, and it is

SO ORDERED.

U. S. D. J.

Footnotes

[1] Cody was also convicted of violations of 19 U.S.C. § 186(b)—receipt of gratuities by a union official, and income tax violations, 26 U.S.C. §§ 7201 and 7206 (1).

[2] Defendant also moves to dismiss the indictment.

[3] Special Attorneys Guadagno and Bernstein stated in Affidavits that they did not become aware of F.B.I. Agent Walton's threats until after the trial. (Aff. of Michael A. Guadagno and of Jerry Bernstein, dated February 23, 1983).

[4] The Court in *Argurs*, noted *Brady's* holding that the right to due process is violated when the prosecution suppresses "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 427 U.S. at 104 n.10, 96 S. Ct. at 2398 n.10 (quoting *Brady v. Maryland*, 373 U.S. at 87, 83 S. Ct. at 1196).

[5] It is also noteworthy that Cody knew Strong for more than eight years prior to the trial and had established a business relationship with him. Cody knew that Strong had testified before the Grand Jury concerning the illegal transactions and Cody hired an experienced investigator who questioned Strong at length. By the exercise of due diligence, Cody could have learned of Walton's statement. It cannot therefore be considered newly discovered evi-

dence. *United States v. Pellegrino*, 470 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 411 U.S. 918, 93 S. Ct. 1556 (1973); *United States v. McWilliams*, 297 F. Supp. 1161, 1163 (E.D. Mo. 1969), *aff'd*, 421 F.2d 1083 (8th Cir.), *cert. denied*, 397 U.S. 1070, 90 S. Ct. 1515 (1970).

[6] We also note that if the evidence had come before the jury it would have been subject to substantial impeachment. *United States v. Kenny*, 645 F.2d 1323, 1344 (7th Cir.), *cert. denied*, 452 U.S. 920, 101 S. Ct. 3059 (1981).

MEMORANDUM OF DECISION AND ORDER OF DISTRICT COURT ADMITTING GRAND JURY TESTIMONY OF MARILYN TAGGART

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

– against –

JOHN CODY,

Defendant.

CR 82-00013(S)

Memorandum of Decision and Order

September 24, 1982

MISHLER, District Judge

The government seeks a ruling on its anticipated offer of the testimony of Marilyn Taggart which was given before a grand

jury of this district on September 20, 1978 and October 2, 1978, on the ground that the testimony has "circumstantial guarantees of trustworthiness" which are equivalent to those of the other hearsay exceptions under Rule 804(b) of the Federal Rules of Evidence and that the testimony meets the other requirements of Rule 804(b)(5).[1] The defendant opposes the offer: (1) on constitutional grounds, i.e., its admissibility would violate the defendant's Sixth Amendment right to be confronted by witnesses against him, and (2) on the grounds that Rule 804(b)(5) should be narrowly applied. For the reasons stated in this memorandum, we find that admission of the testimony under the conditions set forth below does not offend the Sixth Amendment and that when the testimony is used in accordance with the limitations placed upon the use of hearsay statements in the Rule the testimony may properly be admitted. We find nothing in the Rule that limits the exception as suggested by defendant. See note 1, *supra*.

Taggart's Grand Jury Testimony

The North Shore Towers is a large luxury apartment complex on the eastern border of Queens County. Sigmund Sommer was the chief operating officer and stockholder of Sigmund Sommer Construction Co., Inc., the builder and owner of North Shore Towers. Taggart testified that Cody took her to North Shore towers in late 1975 or early 1976 and showed her an apartment which he was going to provide for her use. She testified that Cody paid for some of the furniture and that Cody also used the apartment. Taggart occupied the apartment for about two years but paid no rent. Taggart further testified that Bruce Kay was Cody's chauffeur and that Charles Daglia occasionally chauffeured her at Cody's direction.

Sigmund Sommer (now deceased) testified before the grand jury on September 13, 1978. He testified that he met Cody and Taggart at Aqueduct Race Track in the fall of 1975 or early spring 1976. He stated that Cody asked him for an apartment at North Shore Towers and that he complied with the request.[2]

Count Two of the indictment charges Cody with receiving and accepting the free use of an apartment at North Shore Towers from Sigmund Sommer and Sigmund Sommer Construction Co., Inc. in violation of 29 U.S.C. § 186(b)(1).

Count Five charges that Cody demanded and received the services of Charles Daglia as a chauffeur for himself and others and that Carlin and Atlas Construction Company paid Daglia's salary. The Carlin and Atlas Construction Company employed persons who Local 282 represented, sought to represent and would have admitted to membership.

Count Six charges that Cody demanded and received the services of Bruce Kay as a chauffeur for himself and others and that Parsons and Whittemore Corporation paid Kay's salary. Parsons and Whittemore Corporation employed persons who Local 282 represented, sought to represent and would have admitted to membership.

DISCUSSION

Rule 804(b)(5) may be invoked only when the declarant is unavailable and there are circumstantial guarantees of the trustworthiness of the hearsay statements sought to be admitted. The unavailability of Taggart as a witness is conceded. Thus we turn to an examination of the "circumstantial guarantee of trustworthiness" of the hearsay statements. We previously referred to the testimony of Sigmund Sommer as well as business records and other witnesses which corroborate Taggart's testimony about

the use of the apartment by Taggart and Cody. These reinforce the trustworthiness of Taggart's testimony. Moreover, Taggart's close relationship with Cody at the time she testified and Cody's apparent interest in her attendance at the grand jury[3] gives rise to the inference that Taggart would be unlikely to incriminate Cody by her testimony unless that testimony was truthful. This further supports the trustworthiness of her testimony. Accordingly, I find that Taggart's testimony before the grand jury has circumstantial guarantees of trustworthiness equivalent to those found in the other hearsay exceptions under Rule 804(b).

The significance of a finding of trustworthiness of hearsay testimony, as it relates to the constitutional right of confrontation, is discussed by Chief Judge Haynesworth in *United States v. West*, 574 F.2d 1131, 1136 (4th Cir. 1978), as follows:

> The Supreme Court has consistently held that the Confrontation Clause itself does more than require that the prosecution produce available witnesses for live testimony. It affirmatively requires the exclusion of extra-judicial statements which have no badges of reliability. Thus, we are required to make a separate determination, focusing upon the Confrontation Clause itself, whether Brown's [deceased informant] grand jury testimony bore sufficient guarantees of reliability, *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970), or whether the circumstances provided the jury with sufficient bases to judge its trustworthiness. *California v. Green*, 399 U.S. 149, 161, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970).

See also United States v. Medico, 557 F.2d 309, 314 n.4 (2d Cir. 1977) (Judge Mansfield in dissent held that the double hearsay identification of the getaway car lacked any guarantee of trustworthiness); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S. Ct. 2174 (1977).

The remaining requirements of Rule 804 (b)(5)(A)-(C) are also satisfied here. The hearsay statements sought to be admitted here are evidence of material facts. The statements are more probative on the point for which they are offered than any other evidence the government can procure through reasonable efforts. And, the general purposes of the rules of evidence and the interest of justice will best be served by the admission of these statements into evidence.

The government is directed to submit to the court the excerpts of the testimony of Marilyn Taggart which it intends to offer and to state to the court the manner in which such testimony will be offered.

The court defers rulings on objections based on relevancy or other grounds, i.e., Rule 403, to a more appropriate time.

SO ORDERED.

U. S. D. J.

[1] Defendant argued that the Rule 804(b)(5) exception should be used only to establish a single fact that is critical to the government's case. He based this argument on *United States v. Bailey*, 580 F.2d 341, 347 (3rd Cir. 1978) which cited the Senate Judiciary Committee Report (S. Rep. No. 93-1277) to show that the exception was "to be used only rarely, and in exceptional circumstances."

[2] The government's brief (p.12) represents that the business records of North Short Towers will corroborate the testimony with respect to Taggart's use of the apartment (Apt. 18-W) over the period specified and that witnesses will also corroborate the use of the apartment by Cody and Taggart.

[3] Cody's chauffeur Charles Daglia drove her to and from the courthouse. He also apparently suggested that she dismiss the lawyer representing her and retain Marvin Segal, who is presently co-counsel for defendant.

PRETRIAL DISCOVERY REQUEST OF DEFENDANT JOHN CODY

January 20, 1982

Michael A. Guadagno, Special Attorney
Organized Crime Strike Force
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. John Cody

Dear Mr. Guadagno:

On behalf of the defendant John Cody we hereby request the following discovery and particulars:

DISCOVERY

1. All written and recorded statements (and drafts thereof) made by the defendant and the substance of any oral statement which the government intends to offer as evidence at trial made by the defendant whether before or after arrest in response to interrogation by any such person then known to the defendant to be a government agent;

2. All books, papers, documents, and photographs and tangible objects, or copies or portions thereof, which are within the possession, custody or control, and which are materiai to the preparation of the defense, or intended for use by the government as evidence in chief at the trial, or obtained from or belonged to the defendant, including but not limited to the following records and documents obtained during the course of any federal, state or local investigations:

(a) all records obtained from Local 282 of the International Brotherhood of Teamsters and the Local 282 Welfare and Pension Trust Fund;

(b) all records obtained from Herbert T. Schneider and H.T. Schneider Associates;

(c) all records obtained from John Strong;

(d) all records obtained from Thomas Gallagher and Gallagher Service Corporation;

(e) all records obtained from Henry Roy Norman;

(f) all records obtained from Sigmund E. Somer and Sigmund Somer Construction Company, Inc.;

(g) all records obtained from the Building Department files in Southhampton Village, Suffolk County, New York;

(h) all records obtained from the Office of the Inspector General of the United States Department of Labor;

(i) all records obtained from the Federal Bureau of Investigations;

(j) all records from the Internal Revenue Service of the United States and from New York State Department of Taxation; and

(k) copies of all pleadings and papers, including investigative material, in connection with the civil suit brought by the Internal Revenue Service against the defendant in 1978 which suit was dismissed in 1978.

3. All results and reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are in the possession, custody, or control of the government, the existence of which are known, or by the exercise of due diligence may become known to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial. We also request the government to permit us to inspect and copy or photograph any such results or reports.

4. Whether the government intends to call an informant or accomplice as a witness at trial. If so, please identify him or her and set forth the following: (a) the witness' arrest and conviction record, (b) any and all orders, memoranda and agreements granting the witness any form of immunity from prosecution or other promises or benefits of any kind whatever, (c) any and all

investigations into the witness' conduct or prosecutions involving the witness which might reasonably provide a motive for the witness' cooperation, and (d) any and all records, memoranda and correspondence between the witness and law enforcement authorities which might reasonably reflect on the witness' motives and relationship with the government.

5. Please advise whether any of the following named individuals, corporations or agents or employees of said corporations have been charged with a crime or crimes in connection with any act, incident or transaction alledged in the indictment: Thomas Gallagher; Gallagher Service Corporation; Herbert T. Schneider; H.T. Schneider, Inc.; John Strong; Henry Roy Norman; Sigmund Somer; Sigmund Somer Construction Company, Inc.; Marilyn Taggert; Bruce Kay; Transit Mix Concrete Corporation; Louis Ambrosio; Carlin and Atlas Construction Company; Charles Daglia; and Parsons and Whittemore Corporation.

6. Please set forth when and the circumstances under which the investigation in this matter began and what, if anything, prompted the investigation. Please inform the defendant when your office first became aware of the acts, incidents and transactions alleged in the indictment.

7. With respect to electronic surveillance, if any, please provide the following:

(a) all orders, warrants and applications made in connection with any electronic surveillance during the course of the investigation leading to the indictment;

(b) duplicates of all tapes made of electronic surveillance during the course of the investigation;

(c) duplicates of all photographs and moving pictures made during surveillance;

(d) transcripts of all conversations intercepted through electronic surveillance during the course of the investigation;

(e) all contemporaneous records, including logs and memoranda, made during the course of the electronic surveillance;

(f) any and all reports reflecting the manner and execution of electronic surveillance during the course of the investigation; and

(g) the identity of all law enforcement personnel who participated in the conduct of the electronic surveillance. For purposes of this request we include within the term "electronic surveillance" any recordings of consentual telephone conversations or conversations involving the use of a "wired agent".

8. A list of the names and addresses of all witnesses the government intends to call in the presentation of its case in chief, including:

(a) the full name and address of each such witness;

(b) the federal and local arrest conviction record of any such witness, with updated dispositions;

(c) each statement, promise, assurance or representation made by any governmental authority to any such witness which could reasonably give hope for lenient treatment or which could be considered an inducement to cooperate with the government;

(d) any writing reflecting any agreement or understanding with the federal, state or local government with respect to any such witness; if no writing exists, the sum and substance of such agreement or understanding;

(e) all statements which relate to the subject matter as to which each such witness may testify at trial; and

(f) each investigation by any law enforcement or regulatory agency concerning each such witness which existed after the indictment or during the investigation of this matter.

9. A statement of each person with information pertaining to the defendant or to the allegations of the indictment whom the government does not intend to call as a witness (and whose statements would not be producible under the Jencks Act) as well as the names of all persons interviewed by federal, state and local government agencies whom the government does not intend to call as witnesses.

10. Set forth all information and evidence, which would tend to exculpate the guilt of the defendant or mitigate the degree of the evidence or reduce the punishment which information and evidence is within the knowledge of the government or which by due diligence could be discovered by or made known to the government.

PARTICULARS

11. With respect to *Count I* of the indictment:

A. State whether the government will attempt to introduce evidence of other alleged "racketeering acts" in addition to those already alleged and charged in Counts II through VI and ¶¶ 10(a) through 10(e) of Count I;

B. ¶*10(a)*—

(1) Specify where "within the Eastern District of New York and elsewhere" the defendant did allegedly attempt to obstruct, delay and affect commerce.

(2) Describe the manner in which the defendant allegedly attempted "by extortion" to obtain the sum of $3,000 from Thomas Gallagher and Gallagher Service Corporation with "Thomas Gallagher's consent".

(3) What words and/or acts constitute the alleged "wrongful use of actual and threatened force, violence and fear" in violation of 18 USC §1951?

C. ¶ *10(b)*—Does the government allege that the defendant did *in fact* receive the sum of $3,000 from Thomas Gallagher or merely that he requested, demanded [*sic.*]

D. ¶ *10(c)*—

(1) Specify where "within the Eastern District of New York and elsewhere" it is alleged the defendant received and agreed to receive and solicit the sum of $100,000 from John Strong.

(2) Specify the precise date, time and place between March 22, 1974 and January, 1975 where the defendant did allegedly commit the acts referred to in "(1)" above.

(3) Describe the sum and substance of the alleged scheme or agreement between the defendant and John Strong.

(4) Was the $100,000 allegedly received by the defendant a "fee", "kickback", "commission", "gift" or a "loan"?

(5) Describe the manner in which the defendant was allegedly influenced by John Strong with respect to his actions, decisions and other duties relating to "the matter of the purchase by the Local 282 Trust Funds of real property".

(6) Describe the real property referred to in "(5)" above.

(7) Describe the manner in which the defendant allegedly received such sum of money from John Strong (i.e., whether by cash, check and the denominations of each payment, if more than one).

E. ¶ *10(d)*—(1) Specify where "within the Eastern District of New York and elsewhere" is it alleged that the defendant received and agreed to receive and solicited "a fee, kickback, commission, gift, loan, money and a thing of value, to wit: a sum of money" from Henry Roy Norman.

(2) Specify the precise date, time and place between August, 1969 and August, 1972 where the defendant did allegedly commit the acts referred to in "(1)" above.

(3) Describe the sum and substance of the scheme and agreement between the defendant and Henry Roy Norman.

(4) What sum of money is it alleged the defendant received and agreed to receive and solicited from Henry Roy Norman?

(5) Describe the manner in which the defendant allegedly received such sum of money from Henry Roy Norman (i.e., whether by cash, check or otherwise).

(6) Describe the manner in which defendant was allegedly influenced by Henry Roy Norman with respect to his actions, decisions and other duties relating to "the matter of the purchase by the Local 282 Trust Funds of real property".

(7) Describe the real property referred to in "(6)" above.

(8) Was the sum of money allegedly received by the defendant a "fee", "kickback", "commission", "gift" or "loan"?

F. ¶10(e)—

(1) Specify where "within the Eastern District of New York and elsewhere" the defendant allegedly did "request, demand, receive and accept and agree to receive a thing of value, to wit: construction materials and labor performed during the construction of a home located at 131 Lee Avenue, Southhampton, New York".

(2) Specify the precise date, time and place between 1968 and 1972 where the defendant did allegedly commit the acts referred to in "(1)" above.

(3) Describe in detail the construction materials allegedly supplied and the labor allegedly performed during the construction of said home, including dates.

(4) Describe the sum and substance of the alleged scheme and agreement between the defendant and Herbert T. Schneider and Herbert T. Schneider, Inc.

12. With respect to *Count II* of the indictment:

A. Specify where "within the Eastern District of New York and elsewhere" the defendant did allegedly request, demand, receive, accept and cause to be received and accepted from Sigmund Somer and Sigmund Somer Construction Company, Inc. a thing of value.

B. Describe the sum and substance of the alleged scheme and agreement between the defendant and Sigmund Somer and Sigmund Somer Construction Company, Inc.

13. With respect to *Count III* of the indictment:

A. Specify where "within the Eastern District of New York and elsewhere" the defendant did allegedly agree to receive and solicit a fee, kickback, commission, gift, loan, money and thing of value, to wit: $250,000 from John Strong.

B. Specify the precise date, time and place between September, 1978 up until and including the date of the filing of this indictment the defendant did allegedly commit the acts referred to in "A" above.

C. Does the government allege that the defendant did *in fact* receive such sum of money or merely that he agreed to receive and solicited such sum? If the government alleges that the defendant actually received such sum of money, describe the manner in which it was paid (i.e., whether by cash, check or otherwise).

D. Was the sum of $250,000 allegedly intended as a "fee", "kickback", "commission", "gift" or "loan"?

E. Describe the sum and substance of the alleged scheme and agreement between the defendant and John Strong.

F. Describe the manner in which the payment of such sum of money was allegedly intended to influence the defendant with respect to his actions, decisions and other duties relating to "the matter of the sale of real property by the Local 282 Trust Funds".

G. Describe the real property referred to in "F" above.

14. With respect to *Count IV* of the indictment:

A. Specify where "within the Eastern District of New York and elsewhere" the defendant did allegedly request, demand and receive, accept and cause to be received from Transit Mix Concrete Corporation, a thing of value, to wit: the personal services of Louis Ambrosio as a chauffeur for himself and others.

B. Specify the precise date, time and place between early 1980 through and including August, 1980 where the defendant did allegedly commit the acts referred to in "A" above.

C. Describe the sum and substance of the alleged scheme or agreement between the defendant and Transit Mix Concrete Corporation.

D. Identify the "others" referred to in ¶3 of Count IV of the indictment.

15. With respect to *Count V* of the indictment:

A. Specify where "within the Eastern District of New York and elsewhere" the defendant did allegedly request, demand and receive, accept and cause to be received from Carlin and Atlas Construction Company a thing of value, to wit: the personal service of Charles Daglia as a chauffeur for himself and others.

B. Specify the precise date, time and place between September, 1978 through and including November, 1980 where the defendant did allegedly commit the acts referred to in "A" above.

C. Describe the sum and substance of the alleged scheme or agreement between the defendant and Carlin and Atlas Construction Company.

D. Identify the "others" referred to in ¶3 of Count V of the indictment.

16. With respect to *Count VI* of the indictment:

A. Specify where "within the Eastern District of New York and elsewhere" the defendant did allegedly request, demand and receive, accept and cause to be received from Parsons and Whittemore Corporation, a thing of value, to wit: personal services of Bruce Kay as a chauffeur for himself and others.

B. Specify the precise date, time and place between on or about March, 1977 through and including August 1980 where the defendant did allegedly commit the acts referred to in "A" above.

C. Describe the sum and substance of the alleged scheme or agreement between the defendant and Parsons and Whittemore Corporation.

D. Identify the "others" referred to in ¶3 of Count VI of the indictment.

17. With respect to *Count VII* of the indictment:

Set forth whether the sum of $100,000 which is alleged to be unreported taxable income refers or relates to any specific act or transaction referred to in the indictment and, if so, set forth such specific act or transaction.

Thank you for your courtesies and cooperation in this matter.

Very truly yours,

SPS:kma

Stephen P. Scaring

Office - Supreme Court, U.S.
FILED
MAY 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1374

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government failed to comply with a defense request for exculpatory evidence.

2. Whether the statute, 29 U.S.C. 186(b), proscribing the receipt by union officials of "things of value" from an employer, requires proof of the employer's intent.

3. Whether the court of appeals applied the correct standard of review in determining whether petitioner was prejudiced by the admission of hearsay testimony.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1374

JOHN CODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. A2-A23) is reported at 722 F.2d 1052. The decisions of the district court (Pet. App. A25-A36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1983. A petition for rehearing was denied on December 23, 1983. The petition for a writ of certiorari was filed on February 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, peti-

tioner, a union official, was convicted on one count of conducting the affairs of a union local through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (RICO) (Count I); four counts of receiving illegal benefits from employers, in violation of 29 U.S.C. 186(b)(1) (Counts II, IV, V, VI); one count of income tax evasion, in violation of 26 U.S.C. 7201 (Count VII); and one count of filing a false tax return, in violation of 26 U.S.C. 7206(1) (Count VIII).[1] He was sentenced to concurrent terms of five years' imprisonment on the racketeering and tax evasion counts; to a concurrent three-year term on the false filing count; to concurrent one-year terms on each illegal benefits count; and to fines totaling $80,000. The court of appeals reversed petitioner's conviction on one of the illegal benefits counts (Count II) and affirmed the remaining convictions (Pet. App. A23).

As summarized in the opinion of the court of appeals (Pet. App. A5-A8), the government's evidence at trial showed that beginning in 1968 petitioner, who was president of Local 282 of the Teamsters Union and trustee and manager of its pension fund, used his position for self-enrichment through a continuing practice of demanding kickbacks from employers of union members and others, engaging in extortion, and receiving bribes.

The racketeering charge (Count I) was based on evidence showing 12 predicate offenses.[2] Five of these

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[1] Petitioner was acquitted on an additional substantive count (Count III), charging a kickback for influencing the sale of real estate by the union's pension fund, in violation of 18 U.S.C. 1954.

[2] These consisted of the five illegal benefits offenses (Counts II-VI) that were also charged as substantive offenses, and

arose in connection with petitioner's construction of a new home in Southampton, New York, from 1968 through 1970. The evidence showed that petitioner received services valued at $6,653 from a construction company that employed union members, but that he initially paid only $1,900 for them. He paid the remaining amount only after learning from the contractor that a grand jury was conducting an inquiry concerning the outstanding bill. Pet. App. A5-A6. A subcontractor involved in the project also submitted a bill to petitioner that was not paid for several months. When the prime contractor arranged a meeting between the two, petitioner tendered a check in the amount of $4,333.53 but demanded a $3,000 kickback. When, after three months elapsed and the subcontractor persisted in his refusal to refund $3,000, petitioner threatened to ruin his business. After reporting the threat to the FBI, the subcontractor went out of business when his employees voted to join Local 282. Pet. App. A5-A6; Tr. 415-419, 528, 529, 589. Finally, petitioner received a driveway from a paving company at a cost to the contractor of $7,500. When petitioner requested a "break" on the price from a company official, the bill was reduced to $3,230 (Pet. App. A6).[2]

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seven additional acts that were time-barred by the statute of limitations and therefore could not be charged as substantive offenses. The jury returned separate verdicts on each predicate offense specified. Petitioner was found not guilty on one specification of receiving illegal benefits from an employer, as well as not guilty on Count III. He was found guilty on all other charges and specifications.

[2] The normal charge to a customer for work of this sort would have been $9,000 (Tr. 1725).

Two additional RICO predicate offenses proven at trial were kickback schemes involving the disposition of assets of Local 282's pension fund. The first occurred during 1969 and 1970, when the fund's trustees arranged to purchase the Northampton Country Club with fund assets. When petitioner and another trustee learned that the real estate agency handling the transaction was to receive a $175,000 commission, they demanded a $60,000 kickback. In response, the realtor paid $15,000 to petitioner and $3,200 to the other trustee, and invested the balance in real estate. Pet. App. A6. Petitioner engaged in a similar scheme four years later, when he demanded and received a $100,000 kickback from real estate broker John Strong in connection with the pension fund's purchase of a tract of undeveloped land known as the Pine Barrens (Pet. App. A6).

Four additional predicate offenses under Count I, also charged as separate substantive offenses (Counts II, IV, V, VI), were based on evidence showing that petitioner received free chauffeuring service from "no show" employees—members of Local 282 hired by construction firms with union contracts as "working teamster foremen." These employees, though on the payroll of the contractors, had no duties in connection with the contractors' business and devoted their time to providing uninterrupted chauffeuring service to petitioner (Pet. App. A7).

Count II of the indictment was based on evidence showing that, between 1975 and 1977, petitioner and his mistress, Marilyn Taggart, received the rent-free use of a luxury apartment constructed by a contractor, several of whose subcontractors employed members of the union. At trial, evidence concerning the use of the apartment was presented in the form

of Taggart's grand jury testimony, which was admitted under Fed. R. Evid. 804(b)(5), in lieu of her live testimony, because Taggart had fled to Europe to avoid issuance of a subpoena. This testimony was admitted over petitioner's objection. Pet. App. A8-A9, A33-A36.

2. Real estate broker John Strong, who had made kickback payments to petitioner in connection with real estate purchases by the pension fund, began cooperating with the government in July 1979. At that time, he furnished statements and documentary evidence concerning the kickbacks and agreed to tape record conversations between petitioner, himself, and others. On several occasions in late 1979, however, Strong failed to record conversations with the targets of the investigations, began to miss scheduled meetings with the FBI agents conducting the investigation, and disregarded the agents' instructions. During a meeting with the agents in February 1980, Strong expressed reluctance to record further conversations with petitioner. One of the agents, Kenneth Walton, apparently lost his temper and told Strong that, if he did not follow instructions in the future, "he would throw Strong out of the window or inform [petitioner] that Strong was an informant" (Pet. App. A20-A21).

During the grand jury investigation, Strong testified that petitioner had demanded a kickback. However, following petitioner's indictment, Strong ceased cooperating with the authorities and began to assist petitioner in exculpating himself.* At trial, Strong

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*For example, in May 1981 Strong had an accountant prepare a gift tax return reporting the $100,000 kickback he paid petitioner, in the hope that it would prevent petitioner's

recanted his prior statements and grand jury testimony inculpating petitioner in the kickback scheme and testified that the payment was intended for Buzz Schwenk, a local politician (see Tr. 805, 937; Gov't C.A. Br. 9). The government then elicited testimony from Strong concerning his prior testimony and statements to the FBI and presented evidence showing that his conduct as a witness was the result of fear of petitioner (Tr. 765-767, 783-790, 795-796, 926-929, 947, 1057-1068).

After trial, the prosecution became aware of the agents' earlier threats against Strong.[5] Accordingly, an Assistant United States Attorney interviewed Walton and the other agents involved, obtained their accounts of the incident in affidavits, and notified petitioner's counsel of the incident (Pet. App. A27).

Petitioner then moved for dismissal of the indictment and, alternatively, for a new trial under Fed. R. Crim. P. 33, claiming that the government's failure to divulge the threat prior to trial violated his pretrial discovery rights. One of petitioner's pretrial requests had been for "any and all records, memoranda and correspondence between the witness and

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prosecution for tax evasion (Tr. 799-804, 934; GX 45). He also informed a private investigator hired by petitioner that he "intend[ed] to change [his grand jury] testimony * * * because [he] realize[d] it's probably extremely critical in [petitioner's] case" (Tr. 932, 935, 951).

[5] The attorney handling the case submitted an affidavit stating that he had no knowledge of the agents' threat at the time of trial, and the district court accepted that explanation (Feb. 24, 1983 Tr. 34). Nevertheless, the district court concluded as a matter of law that the information, which was "in the hands of the FBI," was therefore "in constructive possession" of the prosecution (Pet. App. A28).

law enforcement authorities which might reasonably reflect on the witness' motives and relationship with the government" (Pet. App. A39). Another request, which apparently was not brought to the attention of the district court in connection with the motion, was for "each statement, promise, assurance or representation made by any governmental authority to any [government] witness which could reasonably give hope for lenient treatment or which could be considered an inducement to cooperate with the government" (*id.* at A40).

The district court denied the motions. Characterizing the discovery demand as merely a general request for exculpatory material, it held that the proper standard under *United States* v. *Agurs*, 427 U.S. 97 (1976), for determining whether a new trial was warranted was whether, when evaluated in the context of the entire record, the evidence in question created a reasonable doubt as to petitioner's guilt that did not otherwise exist (Pet. App. A29). The court then observed that Strong's testimony concerning the $100,000 kickback was relevant to only one out of 12 predicate racketeering acts charged under 18 U.S.C. 1962(c), and that the jury had specifically found that the government had proven five predicate acts, in addition to the Strong kickback. As a result, it concluded, "not only is no reasonable doubt created by the additional evidence (Walton's threat), it is incontrovertably clear that a conviction would have resulted even if the jury had accepted Cody's contention that Strong's trial testimony, rather than his Grand Jury testimony, was truthful" (Pet. App. A29-A30).

3. The court of appeals affirmed the convictions. The court rejected petitioner's claim that the government had not complied with his discovery requests,

for reasons substantially the same as those of the district court. See Pet. App. A20-A23. It also rejected petitioner's claim that his convictions for receiving illegal benefits in the form of chauffeuring services (Counts IV, V, VI) should be reversed because the government failed to prove that the employers of his chauffeurs had intentionally furnished their services to him, and because the district court failed to instruct the jury that such a finding was an element of the offense. The court of appeals held that it was unnecessary for the government to establish the employer's culpability as a predicate to petitioner's. Rather, all that was necessary was "to show that the employers paid, lent, or delivered the chauffeurs, and that [petitioner] accepted their services" (Pet. App. A14-A19).

The court did, however, reverse petitioner's conviction on the illegal benefits count (Count II) that involved acceptance by Taggart of rent-free use of an apartment from a construction company that employed union members. It reasoned that, under 29 U.S.C. 186(b)(1), the government must prove that the company providing the benefit itself employed members of the accused's labor organization, and thus that the government's proof here that various subcontractors were union employers was insufficient (Pet. App. A10-A12). Because it reversed the conviction on this count, the court did not address petitioner's argument that Taggart's grand jury testimony was improperly admitted into evidence. The Taggart testimony applied directly only to Count II, and the court of appeals found, applying the test of *Klein v. Harris*, 667 F.2d 274, 290 (2d Cir. 1981), that the evidence "could not have led a jury to convict on any count other than Count II" and there was "no sub-

stantial possibility of a prejudicial spillover effect" (Pet. App. A17-A18).[6]

ARGUMENT

1. Petitioner contends (Pet. App. 12-16) that his convictions should be reversed because the government failed during pretrial discovery to supply him with information concerning the confrontation between witness Strong and the FBI agents, described at page 5, *supra*. The district court and the court of appeals, both of which focused their attention on the discovery requests explicitly relied upon by petitioner in his motions for dismissal and new trial in district court and brief in the court of appeals,[7] concluded (Pet. App. A21; see also *id.* at A29) that the requests constituted "a general request for exculpatory evidence," subject to the standard set by this Court in *United States* v. *Agurs*, 427 U.S. 97 (1976). Applying that standard, the court of appeals held that re-

[6] Following trial, the district court had conducted a hearing to determine whether petitioner was responsible for Taggart's absence. After reviewing evidence that she had been physically abused by petitioner (Dec. 1, 1982 H. Tr. 7, 41-42, 187), had made repeated calls to petitioner at his union office shortly before return of the indictment (*id.* at 128-129), and had received a large quantity of cash following her flight, at the same time petitioner reported the theft of over $40,000 (*id.* at 65-74, 88-88, 115-116, 176), it found, by clear and convincing evidence, that petitioner had prior knowledge of Taggart's plan to leave the jurisdiction to avoid testifying and that she fled primarily because she feared violent retribution for her testimony (*id.* at 229-232). Relying on *United States* v. *Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), the district court held that, as a result, petitioner had forfeited the right to object to introduction of her grand jury testimony.

[7] These discovery requests are quoted at Pet. App. A21 n.1.

versal of the conviction was not required, because "it cannot be argued that the threats against Strong created 'a reasonable doubt [as to Cody's guilt] that did not otherwise exist.'" Pet. App. A22 (brackets in original) (quoting *Agurs*, 427 U.S. at 112).

Petitioner complains that this conclusion was based on a "fundamental error [by the court of appeals] as to the record" (Pet. 12). He points out—correctly—that he had made another pretrial discovery request not discussed by the district court or the court of appeals, and he contends that that request was specific enough to require scrutiny under a more stringent standard than the *Agurs* rule for nonspecific requests.[8] However, petitioner did not mention that additional discovery request in his brief in the court of appeals. He there relied exclusively on his more general request for records, memoranda, and correspondence "which might reasonably reflect on the witness' motives and relationship with the government" (Pet. C.A. Br. 53)—a request petitioner does not now contend is "specific" enough to necessitate stricter review.[9] Thus, to the extent that the court of appeals applied an incorrect standard, it is di-

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[8] The additional discovery request was for "each statement * * * made by any governmental authority to any [governmental] witness which could reasonably * * * be considered an inducement to cooperate." Pet. 12 (ellipses and brackets in original).

[9] Even beyond being insufficiently specific, this request "sought only documentary material" (Pet. App. A21 n.1). The government had complied with this request "by providing the defense with documents relating to Strong's cooperation" (*ibid.*). The additional information uncovered after trial was testimonial evidence procured by interviewing the FBI agents involved. See *id.* at A27-A29.

rectly attributable to petitioner's own incomplete presentation of the issues to that court.[10]

Petitioner thus raises no question of general importance warranting this Court's review. The legal standards to be applied in circumstances such as these are well settled, and the decision below does not conflict with them. Moreover, even had petitioner properly presented his current argument in the courts below, there can be little question that his convictions would have been affirmed. Where evidence is sought merely for impeachment purposes, it is deemed exculpatory only when "the credibility of the witness may be determinative of a criminal defendant's guilt or innocence." *United States* v. *Starusko*, 729 F.2d 256, 260 (3d Cir. 1984); *United States ex rel Marenza* v. *Gengler*, 574 F.2d 730, 735 (3d Cir. 1978); see also *United States* v. *Phillips*, 664 F.2d 971, 1026 (11 Cir. 1981), cert. denied, 457 U.S. 1136 (1982). By the same token, even where a specific request for impeachment evidence is made, the evidence cannot be deemed material absent a reasonable likelihood that it could have affected the jury's judgment. See *Agurs*, 427 U.S. at 104 (standard for assessing materiality when specific request is made is whether suppressed evidence might have affected outcome of trial). The Strong testimony related solely to one of the RICO predicate offenses on which the jury convicted.[11] As

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[10] Petitioner asserts (Pet. 9) that he raised the issue of the discovery request quoted in note 8, *supra*, in his "briefs" before the court of appeals; however, he did so for the first time in his petition for rehearing in the court of appeals (Pet. for Reh. 3-4). Petitioner does not claim that he raised the issue before the district court in his motion for dismissal or a new trial.

[11] The testimony related to one time-barred offense specified in Count I (described at page 4, *supra*) and to one sub-

only two predicate crimes are needed to obtain a conviction under the RICO statute (see 18 U.S.C. 1961 (1), (5)), and the jury found that petitioner had committed 10 such acts,[12] Strong's testimony could not have affected the verdict. As the district court found (Pet. App. A29-A30):

> not only is no reasonable doubt created by the additional evidence (Walton's threat), it is incontrovertably clear that a conviction would have resulted even if the jury had accepted [petitioner's] contention that Strong's trial testimony, rather than his Grand Jury testimony, was truthful.

Since the information not provided to petitioner was not material to his defense, therefore, the decision of the court below should not be disturbed. See *United States* v. *LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), cert. denied, No. 82-5571 (Jan. 24, 1983); *United States* v. *Preston*, 608 F.2d 626, 637 (5th Cir. 1979), cert. denied, 446 U.S. 940 (1980).[13]

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stantive charge involving solicitation of a $250,000 kickback on a real estate investment (Count III). Petitioner was acquitted on Count III. That acquittal suggests that petitioner was not prejudiced as the result of the unavailability of the evidence of threats for impeachment purposes.

[12] The district court referred (Pet. App. A29) only to the six time-barred predicate acts specified under Count I but not separately charged. The jury also convicted petitioner of four additional substantive offenses, none of which related to Strong's testimony.

[13] Moreover, the government is not obliged to furnish the defendant information which, with any reasonable diligence, he can obtain himself. See, *e.g.*, *United States* v. *McMahon*, 715 F.2d 496, 501 (11th Cir. 1983), cert. denied, No. 83-5674 (Nov. 28, 1983); *United States* v. *LeRoy*, 687 F.2d at 618 (collecting cases); *United States* v. *Prior*, 546 F.2d 1254, 1259 (5th

2. Petitioner claims (Pet. 16-18) that a union official cannot be convicted of an unlawful receipt of benefits under 29 U.S.C. 186(b)(1) without proof that the employer of the individuals who supplied the benefits "intend[ed] to confer a benefit" on him.[14] This argument is without merit.

Section 186(a) prohibits employers from paying or delivering anything of value to an official of the union representing their workers, and Section 186(b)(1) prohibits union officials from accepting any such payments. As this Court observed in *Arroyo* v. *United States*, 359 U.S. 419, 423-424 (1959) (citations omitted):

> This is not to say that the statute requires mutuality of guilt for the conviction of either the employer or the representative of employees. An

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Cir. 1977) (collecting cases). Although, at the inception of the government's investigation, Strong was a government informant, months before the trial was due to begin he began furnishing information to a defense investigator and, as the district court observed, by the time the trial commenced he was "in [petitioner's] camp" (Feb. 24, 1983 H. Tr. 7-11). Because the defense had ready access to Strong through its investigator, and Strong had allied himself with the defense cause, the district court quite properly found that petitioner had access to information concerning Walton's statements and could have learned of his threats to Strong (assuming he did not in fact actually know of them) through the exercise of due diligence (Pet. App. A30 n.5).

[14] The district court charged the jury that, although it was necessary for the employer to be aware that the services were being used (Tr. 2265), "[t]he fact that the employers tolerated the use of the services to chauffeur [petitioner] is irrelevant." According to the district court, "the focus is on what [petitioner] received. Did he receive a benefit? Did he receive something of value? And did he receive it knowingly, willfully and unlawfully?" (*id.* at 2266).

> employer might be guilty under subsection (a) if he paid money to a representative of employees even though the latter had no intention of accepting. A representative might be guilty if he coerced payments from an innocent and unwilling employer.

Proof that the employer intended to confer a benefit—in the sense that his motive in making the payments in question was to benefit the union representative—is therefore irrelevant to a charge of unlawful receipt of benefits by a union representative. See *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Ricciardi*, 357 F.2d 91, 99-100 (2d Cir.), cert. denied, 384 U.S. 942 (1966).[15]

Here, the government established at trial that petitioner received the services of chauffeurs, paid by the employer, who did not perform duties for the employer.[16] Employer payments for these services are

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[15] In *Arroyo* itself, the union representative embezzled funds contributed by an employer to a union welfare fund. Since the payments were entirely lawful under 29 U.S.C. 186(c), the "defalcating" official, though guilty under local criminal law, was not guilty of a violation of Section 186(b). 359 U.S. at 427. The employer had not paid for or conferred any benefit on Arroyo; rather, the latter had simply stolen money properly paid to the welfare fund. By contrast, the employer's provision of chauffeurs for petitioner here was not lawful, and receipt of the benefits by petitioner was in violation of Section 186(b) whether or not the employer was a willing participant in the transaction.

[16] Petitioner attempts to characterize the arrangement as involving "part-show" employees, who on their own initiative "served as drivers of the union-owned car used by petitioner in connection with union business" (Pet. 16). The evidence established, however, that the employees provided full-time, all-purpose, chauffeuring services to petitioner. *E.g.*, Tr. 1016-

plainly not payments lawfully permitted under Section 186(c). Moreover, the jury was instructed that the employer had to be "aware that the services were being used," and that they had to find that petitioner "knowingly, willfully and unlawfully requested and accepted the services" (Tr. 2265; see Gov't C.A. Br. 63). Thus, under *Arroyo*, further findings regarding the employers' motivations were unnecessary.

3. Finally, petitioner claims (Pet. 17-18) that the court of appeals applied the incorrect standard of review in assessing whether he was prejudiced by the introduction of certain hearsay testimony. The testimony in question—Marilyn Taggart's grand jury testimony concerning the rent-free apartment supplied by a contractor (see pages 4-5, *supra*)—was admitted by the district court under Fed. R. Evid. 804(b)(5), on a finding of sufficient circumstances of trustworthiness. See Pet. App. A34-A35.

On appeal, the court found it unnecessary to address whether Taggart's testimony was properly admitted because it had set aside, on other grounds, petitioner's conviction on the count to which the testimony principally pertained. Pet. App. A14. Assuming without deciding that the testimony was improperly admitted, the court then rejected petitioner's claim that the spillover effect from the testimony infected the remaining counts as well.[17]

1019, 1032-1040, 1109-1111, 1316, 1488. Petitioner's suggestion (Pet. 17) that "the underlying arrangement between the employer and union member is perfectly legal" is entirely conclusory and, in any event, conflicts with the jury's verdict.

[17] The court stated that "[t]here was no substantial possibility of a prejudicial spillover effect in this case as Taggart's testimony fell almost entirely within the confines of the charges contained in Count II. * * * Hence, assuming that Taggart's

Petitioner contends (Pet. 19-20) that in making this determination the court of appeals improperly failed to apply the test for constitutional harmless error articulated in *Harrington* v. *California*, 395 U.S. 250 (1969). However, in determining that there was no prejudicial spillover effect, the court of appeals expressly relied upon its prior decision in *Klein* v. *Harris*, 667 F.2d 274, 290 (2d Cir. 1981). See Pet. App. A18. *Klein*, in turn, adopted the constitutional harmless error analysis for erroneous admission of testimonial evidence, citing, inter alia, *Harrington* v. *California*, *supra*.[12] 667 F.2d at 290. It is therefore apparent that the court below cited and applied the standard petitioner urges.

In any event, not every erroneous introduction of hearsay evidence constitutes a violation of the Confrontation Clause requiring application of the constitutional harmless error doctrine. In *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion), a plurality of this Court articulated a number of "indicia of reliability" to be considered in determining whether the Confrontation Clause was violated as the result of the absence of "a satisfactory basis for evaluating the truth of the prior [hearsay] statement" (quoting

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grand jury testimony was inadmissible, it provides no sufficient basis to reverse [petitioner's] convictions on the other counts" (Pet. App. A18). The court of appeals also observed that, although the grand jury testimony alluded to petitioner's use of chauffeurs, the other evidence on the charges stemming from such use was so strong as to render any taint harmless. *Ibid.*

[12] The *Klein* court also cited *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972), and *Chapman* v. *California*, 386 U.S. 18, 24 (1967), both constitutional harmless error cases. 667 F.2d at 290.

California v. *Green*, 399 U.S. 149, 161 (1970)). They include whether the declarant had personal knowledge of the identity and role of the participants in the crime, whether it was likely the declarant was relying upon a faulty recollection, and whether, under the circumstances, there is reason to believe the declarant misrepresented the defendant's involvement (400 U.S. at 88-89). See *United States* v. *Castillo*, 615 F.2d 878, 883 (9th Cir. 1980); *United States* v. *Snow*, 521 F.2d 730, 735-736 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). The focus of the Confrontation Clause analysis is on the "practical concern for the accuracy of the truth-determining process in criminal trials" (400 U.S. at 89). Where pertinent "indicia of reliability" establish that the introduction of hearsay testimony did not violate the Clause, but only a rule of evidence, its prejudicial impact is assessed under the less stringent standard of Fed. R. Crim. P. 52(a). *United States* v. *Castillo*, 615 F.2d at 883.

Applying these criteria, it is plain that the alleged error here was not of constitutional dimension; thus, even if the court below had applied the standard of review pertaining to nonconstitutional claims, its action would have been perfectly proper. First, Taggart's statements were made under oath, reaffirmed in essential details in the course of three separate grand jury appearances, and—despite a continuing close relationship with petitioner—never recanted. Second, from the nature of the testimony—the circumstances under which she had come to occupy the North Shore Towers luxury apartment—it was clear that she had personal knowledge of petitioner's involvement in making the arrangement and highly unlikely that the statement was the product of a faulty

recollection. Third, as found by the district court (Pet. App. A34-A35), Taggart's grand jury testimony was amply corroborated by other documentary and testimonial evidence. Finally, as the district court expressly found (Pet. App. A35), in view of her relationship with petitioner at the time of the grand jury investigation, it is highly unlikely that Taggart would have given testimony tending to incriminate petitioner unless it was truthful.[19]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

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[19] Moreover, as the district court concluded (Dec. 1, 1982 H. Tr. 229-232), petitioner was in part responsible for Taggart's decision to flee the country. See note 8, *supra*. Thus, petitioner waived his right to object to introduction of her grand jury testimony. See, *e.g.*, *United States* v. *Mastrangelo*, 722 F.2d 12 (2d Cir. 1983), petition for cert. pending, No. 83-1365; *Steele* v. *Taylor*, 684 F.2d 1193 (6th Cir. 1982), cert. denied, No. 82-6902 (Mar. 28, 1983); *United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982).

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No. 83-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CODY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CODY,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this reply brief in order to correct certain clear factual misstatements in the government's brief upon which it bases its entire opposition to the petition for a writ of certiorari.

GOVERNMENT'S BRIEF AT PAGE 5:

"One of the agents, Kenneth Walton, apparently lost his temper and told Strong that, if he did not follow instructions in the future, 'he would throw Strong out of the window or inform [petitioner] that Strong was an informant.' (Pet. App. A-20 - A-21)."

THE RECORD:

There is no support in the record for the above supposition. In describing the threat, Strong himself wrote that three FBI agents had "threatened my life by personally guaranteeing I would be killed" (C.A. App. 605c).* Strong claimed that he had a tape recording of the incident (C.A. App. 605c-605d). In the district court, petitioner sought an evidentiary hearing, and the government vehemently opposed petitioner's request (C.A.App. 679-81). It now attempts to minimize the significance of this extraordinary incident by suggesting, without any support at all, that "[o]ne of the agents . . . apparently lost his temper." The government cannot have it both ways. In light of its opposition to petitioner's request for a hearing respecting the incident, its attempts to trivialize the actions of a senior supervising FBI agent, in the presence of two of his subordinates through pure supposition should be summarily rejected by this Court.

GOVERNMENT'S BRIEF AT PAGE 7:

"Another request [petitioner's specific pre-trial discovery request which the government now admits required disclosure of the murder threat] which apparently was not brought to the attention of the district court in connection with the motion, was for 'each statement, promise, assurance or representation made by any governmental authority to any [government] witness which could reasonably give hope for lenient treatment or which could be considered an inducement to cooperate with the government' (*id.* at A-40)."

THE RECORD:

The record belies the government's assertion that petitioner did not rely in the district court on his request for "each statement . . . made by any governmental authority to any [governmental] witness which could reasonably . . . be considered an inducement to cooperate with the government." In the district

* References preceded by "C.A. App." refer to the Joint Appendix filed in the Court of Appeals.

court, in an affidavit submitted in support of his motion for a new trial, petitioner noted that prior to trial he had "made a specific request" for any communication between the government and any witness which could be considered an inducement to cooperate (C.A. App. 612). During oral argument before the district court, the government did not deny that such a specific request had been made (C.A. App. 697-738). In denying the motion, the district court "assume[d]" that petitioner had made a specific request and that "the government was required to turn over Agent Walton's statement in response to [petitioner's] request" (A-28).* The district court denied the motion for a new trial only on the basis of its conclusion that evidence of the FBI's threat to murder Strong "would not have produced a different result" at trial because petitioner's RICO conviction on Count I, and his sentence of five years imprisonment thereon, would not be affected even if Strong's testimony, and accordingly petitioner's conviction on the tax counts, were written off (A-29).

GOVERNMENT'S BRIEF AT PAGES 10-11:

"However, petitioner did not mention that additional discovery request [the specific request discussed above] in his brief in the court of appeals. He there relied exclusively on his more general request for records, memoranda and correspondence 'which might reasonably reflect on the witness' motives and relationship with the government' (Pet. C.A. Br. 53) — a request petitioner does not now contend is 'specific' enough to necessitate stricter review. Thus to the extent that the court of appeals applied an incorrect standard, it is directly attributable to petitioner's own incomplete presentation of the issues to that court."

THE RECORD:

This is absolutely false. The facts are these: In his initial brief in the court of appeals, petitioner simply noted (at 52), that the district court had correctly "assumed" that he had made a

* References preceded by "A" are to the appendix to the petition herein.

specific request and that the murder threat should have been disclosed. In its answering brief, the government asserted that petitioner had failed to make a specific request, and it quoted the two more general requests. Then, in his reply brief, petitioner clearly refuted this argument by setting forth his specific request for "each statement...made by any governmental authority to any [governmental] witness which could reasonably... be considered an inducement to cooperate with the government." We annex hereto Point IX of petitioner's reply brief in the court of appeals. The specific request described above is at pages 32-33 of that reply brief (A-49-A-50). Thus, that request was clearly before the court of appeals when it considered this issue. We note further that there is absolutely no basis for the government's characterization of that request as an "additional request." It was no afterthought, and the district court clearly understood that a specific request had been made and should have been honored.

GOVERNMENT'S BRIEF AT PAGE 11, NOTE 10:

"Petitioner asserts (Pet. 9) that he raised the issue of [the above specific discovery request] in his 'briefs' before the court of appeals; however, he did so for the first time in his petition for rehearing in the court of appeals (Pet. for Reh. 3-4). Petitioner does not claim that he raised the issue before the district court in his motion for dismissal or new trial."

THE RECORD:

Again, as clearly demonstrated above, this representation is absolutely false. In fact, in its memorandum in opposition to the petitioner's motion for reargument in the court of appeals (at 4), the government conceded that the above specific discovery request had been raised by petitioner in his briefs before the court of appeals prior to its decision.

GOVERNMENT'S BRIEF AT PAGE 7:

"The district court denied the motions...[c]haracterizing the discovery demand as merely a general request for exculpatory material..."

THE RECORD:

The decision of the district court clearly shows that it "assume[d]" petitioner had made a specific request for evidence of the FBI's threat to murder Strong (A-28).

GOVERNMENT'S BRIEF AT 7:

"The court [of appeals] rejected petitioner's claim that the government had not complied with his discovery requests, for reasons substantially the same as those of the district court."

THE RECORD:

As pointed out above, the district court "assumed" that petitioner had made a specific request and that information concerning the murder threat should have been turned over in response to it (A-28). The court denied his motion for a new trial on the grounds that his RICO conviction and five year sentence of imprisonment would stand even if the Strong testimony and petitioner's conviction of the tax counts were written off (A-29 - A-30). We point out that at trial, the government's case was based almost entirely on the highly inflammatory grand jury testimony of two witnesses, Taggart, "the missing mistress," and Strong, the "pay-off" man. The court of appeals wrote off the Taggart testimony on the grounds that it had been admitted in support of an illegal charge. It sustained the Strong testimony, however, on the erroneous ground that petitioner had failed to make a specific request for evidence such as the government's threat to murder Strong (A-21). In so doing, the court of appeals ignored the undisputed record as set forth in petitioner's brief to it, and then without any explanation refused to correct what was a crucial misstatement, and in its opinion upon which a five-year sentence of imprisonment was sustained.

GOVERNMENT'S BRIEF AT PAGE 9:

"The district court and the court of appeals, both of which focused their attention on the discovery requests explicitly relied upon by petitioner in his motions for dismissal and new trial

in the district court and the brief in the court of appeals, concluded (Pet. App. A-21; see also *id.* at A-29) that the requests constituted 'a general request for exculpatory evidence' subject to the standards set by this Court in *United States v. Agurs*, 427 U.S. 97 (1976)." (Footnotes omitted).

THE RECORD:

As already pointed out, the district court correctly "assumed" petitioner's discovery request was specific (A-28). The more general discovery requests were presented to the court of appeals by the government in its answering brief, not by petitioner. In his reply brief, petitioner then set forth his request for "each statement...made by any governmental authority to any [governmental] witness which could reasonably...be considered an inducement to cooperate with the government." The court of appeals apparently overlooked this crucial fact and based its opinion on the two more general requests presented to it by the government, noting erroneously that these two were the "only" requests (A-21 - A-22).

GOVERNMENT'S BRIEF AT PAGES 10-11:

"The Strong testimony related to one of the RICO predicate offenses on which the jury convicted. As only two predicate crimes are needed to obtain a conviction under the RICO statute (see 18 U.S.C. 1961(1), (5)), and the jury found that petitioner had commited 10 such acts, Strong's testimony could not have affected the verdict." (Footnotes omitted).

THE RECORD:

Petitioner was convicted on two tax counts (Counts VII and VIII) as well as on the RICO count, and Strong's testimony was the *only* evidence supporting the tax counts. He was sentenced to concurrent terms of imprisonment of three and five years and fined $15,000 for his tax convictions which the government now so cavalierly writes off. Moreover, in light of the court of appeal's finding that Taggart's grand jury testimony must be disregarded because it had been admitted in connection with

an illegal RICO predicate, petitioner's conviction on the RICO count, and his sentence of five years imprisonment and a fine of $50,000, cannot possibly stand without Strong's testimony.

GOVERNMENT'S BRIEF AT 14:

"[T]he government established at trial that petitioner received the services of chauffeurs, paid by the employer, who did not perform duties for the employer." (Footnotes omitted).

THE RECORD:

The government distorts the record by ignoring crucial facts with regard to petitioner's conviction on the counts relating to the union vehicle. The "chauffeurs" in question were local union officials whose employment with limited duties was open, notorious and pursuant to the formal, industry-wide, collective bargaining agreement. The uncontroverted evidence at trial was that the intent of the respective employers was merely to comply with the requirements of the contract. As it turned out, the employers did not have sufficient work to keep the employees occupied on a full-time basis, and the employees volunteered to serve as drivers of the union car in their free time. The government has never contended that any of the employers violated the law. The evidence at trial conclusively established that petitioner did not request that the employees drive the union car. As a result of this arrangement, petitioner was sentenced to five years imprisonment and a $50,000 fine. No decision of this or any other court justifies such an expansive reading of the misdemeanor provision of the Taft-Hartley Act, 29 U.S.C. 186 (b)(1), let alone such a highly leveraged application of the RICO statute.

GOVERNMENT'S BRIEF AT PAGE 16:

"It is therefore apparent, that the court below cited and applied the [harmless-beyond-a-reasonable-doubt] standard petitioner urges [in connection with the erroneous admission of the Taggart grand jury testimony]."

THE RECORD:

The decision of the court of appeals states, "[t]here was no *substantial possibility* of a prejudicial spillover effect in this case." (A-18; emphasis added). The court of appeals thus explicitly applied a substantial prejudice, rather than a harmless-beyond-a-reasonable-doubt standard of review. As pointed out in the petition, the latter is clearly applicable when testimony is admitted in contravention of the Sixth Amendment right of confrontation.

CONCLUSION

The government bases its opposition to the petition herein entirely on crucial material misstatements of the record. That it should do so certainly demonstrates the obvious merit of the legal arguments petitioner has presented for review. For this reason, and the reasons set forth in the petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 16, 1984

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APPENDIX

Judge Mishler's order. Defense counsel simply did not have the option of producing the tape or foregoing its use in cross-examining Strong.

And, even if Judge Mishler had not ordered production of the tape, defense counsel's use of it during his cross-examination of Strong would not have entitled the government to its production. During cross-examination, defense counsel's use of the tape was limited to showing that Strong had made several statements inconsistent with his trial testimony that William Katsara drove him to appellant's house on the day of the alleged payment (T:880-88, A:359a-i). Under *United States v. Nobles*, 422 U.S. 225, *on remand*, 522 F.2d 1271 (9th Cir. 1975), appellant would have been obligated to produce only the part of the tape relating to the inconsistent statements. In *Nobles*, the Supreme Court held that the defendant had waived his work-product privilege only with regard to the portion of the report used testimonially. 422 U.S. at 240. In this case, the district court ordered defense counsel to turn over the entire tape.

Finally, Rule 613(a) of the Federal Rules of Evidence did not mandate production of the entire tape. That rule requires only that opposing counsel be shown the prior inconsistent statement. It does not mandate production of the entire report or tape in which the statement may be contained.

POINT IX

APPELLANT'S CONVICTION ON COUNTS VII AND VIII MUST BE REVERSED BECAUSE OF THE GOVERNMENT'S FAILURE TO DISCLOSE A THREAT BY AN FBI AGENT TO MURDER, OR CAUSE THE MURDER OF STRONG, THE KEY WITNESS ON THOSE COUNTS, UNLESS HE SUBJECTED HIMSELF TO THE COMPLETE CONTROL OF THE FBI

After reading the government's brief, one would assume that Judge Mishler denied appellant's motion for a new trial on the grounds that evidence of the FBI's threat to murder Strong would not have affected the jury's verdict on the tax counts. This is not the case. The entire thrust of appellant's motion for

a new trial focused on the tax counts (A:684-96). And, Judge Mishler denied the motion solely on the grounds that appellant's RICO conviction would stand even if the Strong testimony were written off (A:747).

On appeal, the government raises a number of arguments to offset the impact of this amazing incident. They were all made to the trial court which disregarded them and resorted to a total write-off of the Strong testimony to save what remained of appellant's conviction.

First, the government argues (at 76) that it did not suppress evidence of the FBI's threat to murder Strong. The point hardly warrants a response. The prosecution clearly had constructive knowledge of the FBI's threat to murder Strong. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Wedra v. Thomas*, 671 F.2d 713, 717 (2d Cir.), *cert. denied*, 102 S. Ct. 3491 (1982); *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975). Indeed, two of the FBI agents present when Walton threatened to murder Strong were at trial on a daily basis assisting the Strike Force in its prosecution of appellant. They were there when a fellow agent testified that Strong was afraid of Cody!

The government also suggests (at 76) that the threat "did not relate to Strong's testimony against Cody." Once again, the point is ludicrous. The threats were admittedly made to assure that Strong would "follow directions" of the FBI agents "who were supervising him" in the Cody investigation; otherwise he would be murdered! And, it was the government which so urgently opposed any hearing to develop the full facts of this incredible incident. Under these circumstances, the wrangling of the government is in and of itself astonishing. It should write-off as expeditiously as possible anything involving Strong in this case, just as Judge Mishler did.

The government further argues (at 76) that evidence of the FBI threat to murder Strong was not exculpatory. This quibble cannot withstand analysis. At trial, the key issue on the tax counts was whether Strong lied in the grand jury when he testified that he had paid a kickback to appellant or at trial when he recanted that testimony. The government supported the latter view with testimony by an FBI agent that Strong

feared Cody. In convicting appellant on the tax counts, the jury obviously accepted this testimony. Evidence showing that the FBI had itself threatened to murder Strong before he testified before the grand jury could certainly have led the jury to the opposite conclusion.

The government further quibbles (at 81-82) that appellant did not make a specific pre-trial request for evidence of "Walton's threat to murder Strong," and that under *United States v. Agurs*, 427 U.S. 97 (1976), appellant must, therefore, demonstrate that the evidence would create a reasonable doubt which did not otherwise exist. The government's argument fails both ways.

As one court has noted, the determination of whether a request is 'specific' or 'general' cannot be made in "a vacuum." *Scurr v. Niccum*, 620 F.2d 186, 190 (8th Cir. 1980). The question is whether under all the circumstances presented by the case, the request was such as to give the prosecution reasonable notice of what the defense desired. *Scurr v. Niccum*, 620 F.2d at 190, *supra*; *United States v. Weidman*, 572 F.2d 1199, 1204 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978); *United States v. McCrane*, 547 F.2d 204 (3rd Cir. 1976). In *Weidman* and *McCrane*, the courts found requests less specific than the one made by appellant in this case to be sufficiently specific to give the prosecution notice of what the defendant was seeking. Indeed, in *McCrane*, the government conceded that a request for "disclosure of all promises made to the witness and all actions undertaken on the witness' behalf or at the witness' request" would suffice. 547 F.2d at 208.

In this case, appellant requested that the government disclose "each statement[6] . . . made by any governmental authority to any such witness which could reasonably . . . be considered an inducement to cooperate with the government" (A:98, ¶ 8(c)). In addition, appellant requested "all records, memoranda and correspondence . . . which might reasonably

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6. The government erroneously maintains (at 82) that appellant requested only documentary evidence.

reflect on the witness' motives and relationship with the government" (A:97). In denying appellant's motion for a new trial, the district court assumed that the above constituted a specific request (A:745). It could not have found otherwise.

Surely, Walton's threat to murder Strong might reasonably "be considered an inducement to cooperate with the government." Appellant's request was, therefore, sufficient to put the government on notice that the defense was seeking evidence showing that a witness such as John Strong was testifying on the government's behalf because the government had threatened to murder him. Certainly, FBI threats to murder key witnesses have not become so commonplace that appellant should be expected to have asked for "threats by government agents to murder or cause the murder of prosecution witnesses."

Thus, under *Agurs*, appellant is entitled to a new trial of the tax counts if evidence of Walton's threat to murder Strong "might have affected the outcome of the trial" of those counts. When considered in the context of the evidence on the tax counts, Walton's threat to murder Strong might very well have affected the outcome for it showed that Strong might have lied in the grand jury because he was afraid of the FBI. Moreover, even if appellant did not make a specific request, and the more stringent *Agurs* standard applies, appellant is still entitled to a new trial on the tax counts. Evidence showing that the FBI threatened to murder Strong before he testified in the grand jury would surely have created a reasonable doubt which did not otherwise exist.

The government next presumes (at 83) that even if it had disclosed Walton's threat to murder Strong, appellant's "experienced defense counsel" would not have introduced such evidence at trial because the government would have introduced testimony from Walton showing Strong was afraid of Cody. The government conveniently ignores the fact that it had already introduced evidence at trial to show that Strong was afraid of Cody (T:926-29, 947, 1088, A:817-21, 391b). Walton's testimony would, therefore, have been superfluous.

Appellant's "experienced defense counsel" would surely have introduced testimony showing that FBI agents had threatened to murder Strong to rebut the government's evidence that it was fear of Cody which motivated Strong. We note that the FBI apparently generated Strong's fear of appellant and then exploited it for patently wrongful purposes.

Finally, the government argues (at 85) that appellant had access to Strong and "either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." The government misses the mark. A defense investigator interviewed Strong for several hours and did not elicit evidence of the FBI's threat to murder him.

The reasons Strong did not provide appellant with such evidence are clear. Strong was scared stiff of the FBI on the one hand, and he wanted to use the incident for bargaining purposes in connection with his own complex relations with the Strike Force. The obvious basic fact is that Strong was playing or attempting to play his own hand. He certainly was not under Cody's absolute control as his failure to give up this valuable "bargaining chip" demonstrates.

In sum, the government suppressed evidence which may very well have led the jury to acquit appellant on the tax counts, and the RICO count, as well. Accordingly, appellant is entitled to a new trial on those counts.

CONCLUSION

For the reasons stated in Points I and II, this Court should reverse appellant's conviction on all counts of the indictment. For the reasons stated in Points III and IV, all of appellant's convictions under 29 U.S.C. § 186(b)(1) should be reversed for insufficient evidence and Counts II, IV, V and VI dismissed. For the reasons stated in Point V, appellant's RICO conviction under Count I of the indictment must be reversed, and that count of the indictment dismissed. For the reasons stated in Points VI, VII, VIII and IX, appellant's convictions on Counts

VII and VIII must be reversed and those counts dismissed, or, in the alternative, a new trial ordered.

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Respectfully submitted,

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